THE LAW
RELATING TO CHARITIES

BY

F. M. WHITEFORD

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THE

LAW RELATING TO CHARITIES.

THE

LAW RELATING TO CHARITIES,

ESPECIALLY

WITH REFERENCE TO THE VALIDITY AND CONSTRUCTION

OF

Charitable Bequests and Conveyances.

BY

FERDINAND M. WHITEFORD,

OF LINCOLN'S INN, BARRISTER-AT-LAW.

LONDON:

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PREFACE.

THE intention to give property to Charity is frequently defeated through non-compliance with the law, and particularly with the provisions of the Act 9 Geo. 2, c. 36, generally known as the Mortmain Act. It is therefore thought that a short treatise giving the effect of the cases decided on the construction of that Act, and dealing generally with the Law relating to Charities, may be found useful.

In order to ensure brevity much has necessarily been omitted which would otherwise have naturally found its place in a work on the subject of Charities.

It is, however, hoped that the omissions found necessary are not such as to interfere with the object the Author has chiefly had in view, namely, that of providing a work which might be practically useful to those engaged in carrying the intentions of donors to Charities into effect.

LINCOLN'S INN,
January, 1878.

TABLE OF CASES.

B.

ADDENDA AND CORRIGENDA.

Page 22. *After* "*Liley* v. *Hay*," *add* "but see observations of V.-C. Wickens on this case in *Gillam* v. *Taylor*, L. R. 16 Eq. 581."

„ 35. Judgment debts being a charge on lands, cannot be bequeathed to a charity: *Collinson* v. *Pater*, 2 R. & M. 344.

„ 43. Where a trustee under a conveyance which is unenrolled does not set up the defect, the Court may decline to take notice of it, and appoint new trustees: *Att.-Gen.* v. *Ward*, 6 Hare, 477; and see *Att.-Gen.* v. *Munro*, 2 De G. & Sm. 122, 199.

„ 63. *Fenton* v. *Wills* is now reported, 7 Ch. D. 33.

„ 66. In *Sinnett* v. *Herbert* it was held by Hatherley, L. C., that under a bequest of residue to trustees for erecting or endowing a church, they took the pure personalty, and also £500 out of the impure personalty. But this seems to amount to marshalling the assets.

„ 81. Usage as evidence of trusts, *add* a reference to *Att.-Gen.* v. *Bunce*, L. R. 6 Eq. 563.

THE

LAW RELATING TO CHARITIES.

CHAPTER I.

INTRODUCTORY.

DIFFERENT explanations have been offered of the origin of the term "mortmain," but it is not thought necessary to discuss these explanations in a work like the present, since whatever doubt may exist as to the original meaning of the term, there is no doubt as to that which it has acquired, and in which it is now used.

Alienations in mortmain are, properly speaking, alienations of lands or tenements to corporations. Such bodies having a perpetual succession, the lord of the fee by these alienations lost the benefit of the fines, rights of ward and escheat, and other rights to which, under the feudal system, he was entitled, the land coming, as it was said, into a dead hand (*main morte*). From the fact that in earlier times such alienations were invariably made to the Church, and that, as will hereafter be seen, pious uses have always been held to be a branch

of charitable uses, the law of mortmain has always formed a part of the law of charities, though the two are not otherwise necessarily connected.

Corporations are, equally with individuals, capable of being trustees for charitable purposes; indeed, the fact of their perpetual succession obviously renders them, in some respects, peculiarly fit trustees to carry into effect charities the founder of which generally aims at securing to them perpetual existence. By the Common Law corporations appear to have been under no disabilities with respect to the acquisition of lands, except such as equally applied to individuals; that is to say, alienations of lands were in every case required to be made with consent of the lord of the fee. The Statute Law restraining such alienations was at first exclusively, and has at all times been mainly directed against the acquisition of land by the Church; the constant efforts of which to evade the restrictions sought to be imposed on it, and the success with which such efforts were attended, are too well known to require comment. The early Statutes of Mortmain still regulate conveyances to corporations, whether charitable or not, and it is therefore necessary briefly to refer to such statutes. The first enactment on the subject of mortmain is that contained in the second of Henry the III.'s great charters, 9 Hen. 3, c. 36, re-enacted 25 Edw. 1, c. 36, and is as follows:—

"It shall not be lawful from henceforth to any

to give his lands to any religious house, and to take the same land again to hold of the same house. Nor shall it be lawful to any house of religion to take the lands of any, and to lease the same to him of whom he received it. If any from henceforth give his land to any religious house, and thereupon he convict, the gift shall be utterly void, and the land shall accrue to the lord of the fee."

This enactment applied only to conveyances to religious houses, and was soon found insufficient for the object in view, namely, to prevent the vesting of land in the Church.

The statute appears also to have been evaded by the religious houses, who resorted to the device of obtaining from the owners leases for long terms of years at nominal rents.

These reasons led to the passing of the Statute *de Religiosis viris*, 7 Edw. 1, st. 2, c. 1, whereby it is enacted that "no person, religious or others, whatsoever he be, that will buy or sell any lands or tenements, or under the colour of gift or lease, or that will receive by reason of any other title, whatsoever it be, lands or tenements, or by any other craft or engine will presume to appropriate to himself, under pain of forfeiture of the same, whereby such lands or tenements may anywise come into mortmain. We have provided also that if any person, religious or other, do presume either by craft or engine to offend against

this statute, it shall be lawful for us and other chief lords of the fee immediate to enter into the land so aliened within a year from the time of alienation, and to hold it in fee as an inheritance. And if the chief lord immediate be negligent and will not enter into such fee within the year, then it shall be lawful to the next chief lord immediate of the same fee to enter into such land, if the next lord be negligent in entering into the same fee as aforesaid. And if all the chief lords of such fees, being of full age, within the four seas and out of prison, be negligent or slack in this behalf for one whole year, we immediately after the year accomplished from the time that such purchases, gifts, or appropriations happen to be made, shall take such lands and tenements into our hand, and shall enfeoff other therein by certain services to be done to us for the defence of our realm, saving to the chief lords of the same fees, their wards and escheats, and other services thereunto due and accustomed."

The Statute of *Quia Emptores*, 18 Edw. 1, abolishing subinfeudations, and making it lawful for all men to alien their lands to be held of their next immediate lord, expressly excepted alienations in mortmain. None of the preceding enactments appear to apply to lay corporations, and their provisions were evaded by the Church by the introduction of secret uses, the mischiefs arising from which were, as is well known, finally remedied

by the Statute of Uses, 27 Hen. 8, c. 10, for turning uses into possession, the earlier statutes aimed at the same mischiefs having been found ineffectual.

By one of these statutes, 15 Rich. 2, c. 5, after directing that lands held to the use of religious or spiritual persons, or to the use of guilds or fraternities, should be amortized or sold, it is enacted that "because mayors, bailiffs, and commons of cities, boroughs, and other towns which have a perpetual commonalty, and others which have offices perpetual, be as perpetual as people of religion, that from henceforth they shall not purchase to them and to their commons or office upon pain contained in the said Statute *de Religiosis*. And whereas others be possessed or hereafter shall purchase to their use, and they thereof take the profits, it shall be done in like manner as is aforesaid of people of religion."

It was afterwards found that the alienation of lands to brotherhoods and fraternities which were unincorporated was equally mischievous with alienations to corporations, though not coming within any of the Statutes of Mortmain. The case of such unincorporated bodies was therefore provided for by the Statute 23 Hen. 8, c. 10, whereby assurances and trusts of lands to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties, corporations or brotherhoods, created and made of devotion or by common assent

of the people without any corporation, if made for more than twenty years from that date, were declared to be utterly void.

See as to the construction of this statute, *Porter's Case*;[1] *Att.-Gen.* v. *Webster*.[2]

The effect of the Mortmain Acts, properly so called, may be briefly stated as providing that lands or tenements, as advowsons, rent-charges, tithes &c., aliened in mortmain became forfeited in the first instance to the immediate lord of the fee, and on his neglect to insist on the forfeiture, to the King, who, however, could only take advantage of the forfeiture to enter upon the lands after office found in the same manner as in the case of escheat for failure of heirs. For an instance in which the right of forfeiture was insisted on by the Crown, see Shelford on Mortmain, p. 10 u E.

As the Statutes of Mortmain did not render alienations in mortmain absolutely void, but only gave a right of forfeiture to the mesne lord or to the King, this right was of course capable of being waived; hence arose the practice of obtaining licenses in mortmain, by virtue of which corporations are enabled to hold lands aliened to them.

It was at first required that such licenses should be obtained from the mesne lord, as well as from the King (27 Edw. 1, st. 2, 34 Edw. 1, st. 3),

[1] 1 Russ. 22. [2] L. R. 20 Eq. 483.

but the rights of the mesne lords appear to have been gradually disregarded, and a license from the King alone was in all cases held sufficient.

The right of the Crown to grant licenses in mortmain is now regulated by Statute 7 & 8 Wm. 3, c. 37, by which the Crown is empowered to grant licenses to any person or persons, bodies politic or corporate, their heirs or successors, to alien in mortmain and also to hold in mortmain any lands, tenements, rents, or hereditaments.

By sect. 2 it is declared that lands or tenements so aliened or acquired shall not be subject to forfeiture. This Act appears to recognise the right of the Crown alone to grant licenses which will exclude the right of the mesne lords to insist on the forfeiture.

In the case of trading corporations, licenses are now granted by the Board of Trade.

The Statute of Wills, 34 Hen. 8, c. 5, contains an express exception as to devises to corporations, and such devises consequently, until the passing of the Wills Act, 7 Wm. 4 & 1 Vict. c. 26, were in all cases invalid at Law, though the restriction never extended to charities in Equity, or was so far removed in favour of charities by the construction placed on the Statute of Charitable Uses, 43 Eliz. c. 4, as to render such devises valid in Equity: *Incorporated Society* v. *Richards*.[1]

The Statute of Wills, 34 Hen. 8, c. 5, is ex-

[1] 1 Dr. & W. 320.

pressly repealed by the recent Wills Act, 7 Wm. 4, c. 26, s. 2, therefore any restrictions which now exist affecting such devises are solely due to the operation of the Mortmain Acts: see 1 Jar. on Wills, p. 58.

CHAPTER II.

OF CHARITABLE USES.

ALTHOUGH charitable uses were recognised in Equity at a date long prior to the statute known as the Statute of Charitable Uses (43 Eliz. c. 4) that statute has a peculiar importance, inasmuch as it is by a reference to its preamble that the Court is still guided in determining whether a particular trust is charitable or not, a question on which its validity or invalidity may in many cases (as will be shown hereafter) depend.

The object of the Act of Eliz. was to provide for the appointment of commissioners who should inquire into and redress the abuses and breaches of trust in the management of property given for charitable purposes which then, as later, extensively prevailed.

The widest and most liberal construction was, as is well known, placed on the provisions of this Act in favour of charities, and where no personal incapacity, as infancy, affected the donor the disposition was in general established: *Att.-Gen.* v. *Skinners' Co.*[1]

[1] 2 Russ. 417.

Thus defective assurances, as wills or conveyances without fine or recovery by tenants in tail, were held valid as appointments. Corporations as well as individuals were held capable of taking lands and tenements by wills, see *Incorporated Society* v. *Richards*,[1] though in the case of devises to corporations the legal estate would not pass: *Souley* v. *Clockmakers' Co.*[2] In the case of copyholds the want of a surrender to the uses of a will was supplied; and so far was the zeal for establishing a charity allowed to prevail that a retrospective operation was attributed to the Act: *Att.-Gen.* v. *Skinners' Co.*,[3] in which a will of lands made before the passing of the Wills Act, 34 Hen. 8, c. 5 (which was therefore invalid when made), was in favour of charities upheld as a "limitation or appointment." See too *Att.-Gen.* v. *Downing*;[4] *Att.-Gen.* v. *Andrews*;[5] *Jenner* v. *Harper*.[6] For a long time after the passing of the Act of Eliz., and indeed previously to that Act, an amount of favour was shown to dispositions by will or otherwise in favour of charities, the result of which has been to establish principles which have now obtained the force of law and are binding on the Courts though not always easily defended or explained.

The evils resulting from an unrestricted liberty

[1] 1 Dr. & W. 293.

[2] 1 Br. C. C. 81.

[3] 2 Russ. 418, citing *Collison's Case*, Hob. Rep. 156; Moore, 888.

[4] Amb. 550, 571.

[5] 1 Ves. Sen. 224.

[6] 1 P. Wms. 246.

of disposing of property to charities could not, however, fail to make itself felt, and to meet those evils was the object of the Act of 9 Geo. 2, c. 36, as appears from its preamble. The title of this Act, according to which it is "An Act to restrain the dispositions of land whereby the same become inalienable," is somewhat misleading.

The object of the statute really was to prevent the disinheriting of heirs by improvident dispositions upon the approach of death: *Att.-Gen.* v. *Day*;[1] *McIntosh* v. *Townsend*.[2]

By this Act, after reciting that "gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited by Magna Charta and divers other wholesome laws, as prejudicial to and against the common utility, nevertheless the public mischief has of late greatly increased by many large or improvident alienations or dispositions made by languishing or dying persons, to uses called charitable, to take place after their deaths, to the disherison of their lawful heirs," it is enacted:

Sect. 1. That from and after the 24th of June, 1736, no manors, lands, tenements, rents, advowsons, or other hereditaments, corporeal or incorporeal whatsoever, nor any sum or sums of money, goods, chattels, stock in the public funds, securities for money, or any other personal estate whatsoever, to be laid out or disposed of in the purchase of any

[1] 1 Ves. Sen. 218. [2] 16 Ves. 335.

lands, tenements, or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or anyways conveyed or settled to or upon any person or persons, bodies politic or corporate or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment, or settlement of any such lands, tenements, or hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds), be made by deed indented, sealed, and delivered in the presence of two witnesses, twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death), and be enrolled in the Court of Chancery within six calendar months after the execution thereof; and unless such stocks be transferred in the public books usually kept for the transfer of stocks six calendar months at least before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him.

By sect. 3 it is enacted, "That all gifts, grants, conveyances, appointments, assurances, transfers, and settlements whatsoever of any lands, tenements, or other hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of any stock, money, goods, chattels, or other personal estate, or securities for money, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, or of any estate or interest therein, or of any charge or incumbrance affecting or to affect the same, to or in trust for any charitable uses whatsoever, which shall at any time from and after the said 24th day of June 1736 be made in any other manner or form than by this Act is directed and appointed, shall be absolutely and to all intents and purposes null and void."

Sect. 2 provides that "nothing hereinbefore mentioned relating to the sealing and delivery of any deed or deeds twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend or be construed to extend to any purchase of any estate or interest in lands, tenements, or hereditaments, or any transfer of any stock to be made really and *bonâ fide* for a full and valuable consideration actually paid at or before the making such conveyance or transfer without fraud or collusion

This section was, according to Lord Hardwicke, *Att.-Gen.* v. *Day*,[1] intended to meet the case of Queen Anne's Bounty and similar charities, which were by their rules bound to lay out their funds in the purchase of lands.

Sect. 4 exempts from the provisions of the Act "dispositions to or in trust for either of the two Universities within that part of Great Britain called England, or any of the colleges or houses of learning within either of the said Universities, or to or in trust for the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars only upon the foundation of the said colleges of Eton, Winchester, and Westminster."

Sect. 5 imposes a restriction as to the number of advowsons to be held by either of the two Universities, which restriction has been removed by 45 Geo. 3, c. 101.

Sect. 6 provides that the Act shall not apply to Scotland.

It is to be observed—1st. That the Act contains no restrictions whatever on dispositions by will or otherwise of money or personal estate not connected with land, pure personal estate.

2nd. The provisions of the Act extend to all charities, whether incorporated by charter or special Act, either before or after the passing of this Act, or unincorporated, the only exemptions

[1] 1 Ves. Sen. 223.

being those contained in the Act or in Acts subsequently passed.

Thus in the case of Queen Anne's Bounty (for the augmenting of poor livings), a charity incorporated by a special Act of Parliament, 2 & 3 Anne, c. 11, empowering them to take by deed or will lands, tenements, and hereditaments, goods and chattels, the corporation was held incapable, after the passing of the Act 9 Geo. 2, c. 36, of taking a bequest of money, as by the rules of that charity the funds were to be laid out in land: *Widmore* v. *Woodroffe*;[1] *Middleton* v. *Clitherow*.[2] So, too, in a recent case under a gift of the proceeds of sale of real estate to the charities of Plymouth the guardians of the poor, who were incorporated with power to take land by deed or will by an Act 6 Anne, c. 46, were held incapable of taking: *Iuckraft* v. *Pridham*.[3]

It has been said that the custom by which the freemen of London were enabled to devise lands in mortmain, having been expressly preserved by Magna Charta, is still subsisting; but this was denied to be law by Sir R. P. Arden, quoted in Highmore on Mortmain, p. 127; and in the case of *Middleton* v. *Cator*[4] all that was actually decided is that the custom if existing must be strictly confined to lands within the city.

[1] Amb. 636.
[2] 3 Ves. 734.
[3] 6 Ch. D. 205; 25 W. R. 747.
[4] 4 Br. C. C. 409.

3rd. The statute applies to charitable uses only; and although generally known as the Mortmain Act, is in fact wrongly so called.

The first question, therefore, that presents itself or consideration is what is a "charitable use" within the meaning of the statute.

In determining this question the Court has, as before stated, since the passing of that Act, always been guided by the Statute 43 Eliz. c. 4, above referred to (p. 9), and has held that as well the objects expressly enumerated in that Act as those which are analogous are charitable uses: *Dolan* v. *Macdermot*.[1]

It is proposed here to give only a selection of the cases, such as is sufficient to illustrate the principles acted on by Courts in determining whether a particular alienation is to a charity or not.

The charitable uses enumerated in the preamble to the 43 Eliz. c. 4, are:—

"Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and marines; schools of learning, free schools and scholars in universities; repair of bridges, ports, havens, causeways, churches, sea-banks and highways; education and preferment of orphans; relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons

[1] L. R. 3 Ch. Ap. 676.

decayed; relief or redemption of prisoners or captives, and aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers, and other taxes."

This Act, as before stated, was passed for the purposes of remedying breaches of charitable trusts, and the preamble, after stating in effect that lands, tenements, chattels, money, &c., had been given for the above purposes, but had been misapplied contrary to the intention of the donors, by way of remedy provides for the appointment of commissioners, who should inquire into breaches of trust and make orders for carrying such trusts into execution, an appeal being given to the Lord Chancellor: see the case of *Jenner* v. *Harper*.[1]

The following have, among other objects, been held to be charitable uses:—"Relief of poor:" *Att.-Gen.* v. *Rance*;[2] *Thompson* v. *Corby*.[3] Hospitals: see for instance *Att.-Gen.* v. *Kell*;[4] *Hawkins* v. *Allen*,[5] *Re Alchin's Trusts*.[6] "Schools of learning" and "free schools:" *Att.-Gen.* v. *Lord Lonsdale*;[7] *Att.-Gen.* v. *Williams*.[8] "Scholars in Universities:" *Att.-Gen.* v. *Whorwood*;[9] *Att.-Gen.* v. *Downing*.[10] "Relief of prisoners and captives:" *Att.-Gen.* v. *Painters' Co.*[11] "Education and pre-

[1] 1 P. Wms. 247.
[2] Cited in *Att.-Gen.* v. *Clarke*, Amb. 422.
[3] 27 Beav. 649.
[4] 2 Beav. 575.
[5] L. R. 10 Eq. 246.
[6] L. R. 14 Eq. 230.
[7] 1 Sim. 109.
[8] 4 Br. C. C. 526.
[9] 1 Ves. Sen. 534.
[10] Amb. 550, 571.
[11] 2 Cox, 51.

ferment of orphans," *Powell* v. *Att.-Gen.*;[1] *Att.-Gen.* v. *Comber*.[2] "Repair of churches," which includes monuments and memorial windows in the church: *Att.-Gen* v. *Ruper*;[3] *Hoare* v. *Osborne*,[4] though repair of vaults and monuments in the churchyard cannot be the subject of a charitable use: *Rickard* v. *Robson*;[5] *Dawson* v. *Small*;[6] *Re Williams*.[7]

A bequest for maintaining the organ, *Att.-Gen.* v. *Oakover*[8] (where bequest for payment of the organist was also held a charity), and a bequest for maintaining the chimes of a church, *Turner* v. *Ogden*,[9] also fell under this head.

By analogy with the statute of Eliz., alienations having for their object the promotion of religion or of learning, and generally all alienations intended to benefit the public, as gifts to provide for the repair of sea-banks and highways, mentioned in the Act of Eliz., are charitable uses.

Thus gifts for the promotion of religion, see *Townsend* v. *Carus*;[10] *Wilkinson* v. *Lindgren*.[11]

For maintaining the worship of God: *Att.-Gen.* v. *Pearson*.[12] So a devise of land to a priest and his successors, and bequest of proceeds of sale of

[1] 3 Mer. 48.
[2] 2 S. & S. 93.
[3] 2 P. Wms. 125.
[4] L. R. 1 Eq. 585.
[5] 31 Beav. 244.
[6] L. R. 18 Eq. 114.
[7] L. R. 5 Ch. D. 735.
[8] Cited 1 Ves. Sen. 535.
[9] 1 Cox, 316.
[10] 3 Hare, 257.
[11] L. R. 5 Ch. 570.
[12] 3 Mer. 353, 409.

land "to the then minister of the Catholic chapel at Kendal," *Thornber* v. *Wilson*,[1] were held charitable, and therefore void under the Mortmain Act. So a bequest for distributing Bibles, Testaments, and other religious books and tracts, *Att.-Gen.* v. *Stepney*,[2] and a bequest for the dissemination of the works of Joanna Southcott, *Thornton* v. *Howe*,[3] have been held valid as charities. So bequest of residue to certain institutions, or to any other religious institutions or purposes: *Wilkinson* v. *Lindgren*.[4]

As to gifts for the promotion of learning, see *Whicker* v. *Hume*.[5]

Bequests to the Royal and Geographical Societies: *Beaumont* v. *Oliveira*;[6] bequest to found a lectureship at one of the Universities: *Att.-Gen.* v. *Margaret and Regius Professors, Cambridge*;[7] so to found a Professorship of Archæology: *Yates* v. *Univ. Coll.*[8]

As to dispositions for the public benefit, see *Att.-Gen.* v. *Heelis*.[9] Thus a conveyance of lands to a parish is a charitable gift: *Att.-Gen.* v. *Webster*;[10] *In re St. Bride's, Fleet Street*;[11] so bequest for supplying the town of Chepstow with spring-water:

[1] 3 Drew. 245; 4 Drew. 350.
[2] 10 Ves. 22.
[3] 31 Beav. 14.
[4] L. R. 5 Ch. 570.
[5] 1 De G. M. & G. 506; 7 H. L. Cas. 124.
[6] L. R. 4 Ch. App. 309.
[7] 1 Ver. 55.
[8] L. R. 8 Ch. 454; L. R. 7 H. L. 438.
[9] 2 S. & S. 76.
[10] L. R. 20 Eq. 483.
[11] W. N. 1877, pp. 95, 149.

Jones v. *Williams*;[1] for the benefit and ornament of a town: *Mayor, &c. of Faversham* v. *Ryder*;[2] so too bequest to establish a lifeboat: *Johnston* v. *Swann*;[3] so also bequest to the Chancellor of the Exchequer for the benefit of Great Britain: *Nightingale* v. *Goulbourn*;[4] so a bequest to found an institution for the investigation and care of diseases of quadrupeds and birds useful to man: *Univ. of London* v. *Yarrow*;[5] so a bequest for the encouragement of good servants: *Loscombe* v. *Wintringham*,[6] and see the note at the end of this case for other instances of charitable uses; so a bequest for the benefit of poor persons emigrating to certain colonies: *Barclay* v. *Maskelyne*.[7]

A trust may be charitable in whatever manner the funds may have been provided, *Att.-Gen.* v. *Brown*,[8] *Att.-Gen.* v. *Eastlake*,[9] if the purpose to which they are to be applied is a charity, and therefore may be the proper subject of administration by the Court of Chancery and for the intervention of the Attorney-General. It has, however, been decided that a conveyance to the overseers and guardians of the poor of land for a workhouse is not charitable and does not require enrolment: *Burnaby* v. *Barsby*.[10]

[1] Amb. 651.
[2] 5 D. G. M. & G. 350.
[3] 3 Mad. 457.
[4] 2 Ph. 594.
[5] 1 D. & J. 72; 23 Beav. 159.
[6] 13 Beav. 87.
[7] 4 Jur. N.S. 1294.
[8] 1 Swan. 265.
[9] 11 Hare, 205.
[10] 4 Hur. & N. 690.

These are some objects which would at first sight appear to be charities, but which, being merely for the benefit of individuals and not of the public generally, are not charitable uses, *Att.-Gen.* v. *Whorwood*,[1] and are therefore not in any way affected by the laws respecting charities, or entitled to the favour which is in some respects shown to dispositions to charitable uses.

Thus a bequest for keeping up a private museum in Shakespeare's house at Stratford was held void as not being to a charity, and infringing the law against perpetuities: *Thompson* v. *Shakespear*.[2]

So a devise of land to the Penzance Public Library was held not charitable, and void as tending to a perpetuity: *Carne* v. *Long*;[3] but in this case the result would have been the same had the gift been charitable, the gift being by will: see also *Re Clark*,[4] where a friendly society was held not to be a charity.

An instructive case on this subject is that of *Cocks* v. *Manners*,[5] where the will contained bequests of pure personal estate and personal estate of the nature of land (impure personalty) to the Newport Catholic chapel and the Brighton Catholic chapel, for the general purposes thereof, payable to the officiating priest for the time being;

[1] 1 Ves. Sen. 534.
[2] 1 D. G. F. & J. 399.
[3] 2 D. G. F. & J. 75.
[4] 1 Ch. D. 497.
[5] L. R. 12 Eq. 574.

to the Dominican convent at Carisbrook, payable to the Superior for the time being, and to the Sisters of the Charity of St. Paul at Selley Oak, near Birmingham. The bequests to the chapels were, of course, charities, and failed as to the impure personalty. The Dominican Convent was held not a charity as the nuns were a close order, their only object in living together being mutual religious edification, and the gift was therefore held good as to the pure and impure personalty alike, as not tending to a perpetuity. The bequest to the Sisters of St. Paul was held to be a charitable bequest, and therefore void as to the impure personal estate. So in *Rickard* v. *Robson*,[1] a bequest to the churchwardens upon trust to keep up the tombs of the testator and his relatives, was held void as not charitable and tending to a perpetuity, an objection which would, of course, not have applied had the bequest been to a charity. So a bequest to ten poor clergymen of the Church of England, to be selected by J. S., was held not charitable: *Thomas* v. *Howell*;[2] see too *Brunsdon* v. *Woolredge*;[3] *Att.-Gen.* v. *Haberdashers' Co.*;[4] *Liley* v. *Hay*.[5]

Bequests for the perpetual benefit of poor relations are charitable, and of course it is no objection to the validity of such gifts that they tend to

[1] 31 Beav. 244.
[2] L. R. 18 Eq. 198.
[3] Amb. 507.
[4] 1 M. & K. 420.
[5] 1 Hare, 580.

a perpetuity: *Att.-Gen.* v. *Price*;[1] *Gillam* v. *Taylor*.[2] Indeed, it does not appear to be settled whether a devise or bequest to poor relations, which does not contemplate a perpetuity, is charitable: *Widmore* v. *Woodroffe*;[3] but see *contrà Att.-Gen.* v. *Buckland*;[4] and *Mahon* v. *Savage*.[5]

It need hardly be said that gifts having for their object any purpose which is contrary to law or against public policy cannot be valid as a charity. Thus a bequest for the purpose of paying the fines of persons imprisoned under the Game Laws was held invalid: *Thrupp* v. *Collett*;[6] so a bequest "towards the political restoration of the Jews to Jerusalem and to their own land" was held void: the V.-C. Knight Bruce observing that the object of the bequest, if it could be held to mean anything, was "to create a revolution in a friendly country:" *Habershon* v. *Vardon*.[7]

The subject of gifts which are void as being to superstitious uses, now that the Jews, Roman Catholics, and Dissenters have been placed on the same footing with respect to their charities as the rest of the community, is of less importance than formerly, and requires only a brief notice.

The first statute on the subject is the 23 Hen. 8, c. 10, already referred to. This statute,

[1] 17 Ves. 371.
[2] L. R. 16 Eq. 581.
[3] Amb. 636, 640.
[4] Cited 1 Ves. Sen. 231.
[5] 1 Sch. & Lef. 111.
[6] 26 Beav. 125.
[7] 4 D. G. & Sm. 467.

which, as already noticed, declared void assurances to the use of churches, chapels, or communities (*ante*, p. 5), also declared void "assurances to uses to have obits perpetual, or the continual service of a priest for ever, or for threescore or fourscore years." This statute, and the retrospective statute (1 Edw. 6, c. 14), treating as gifts to superstitious uses gifts for the benefit of the souls of the dead, as by masses or the perpetual maintenance of lamps or candles in churches or chapels, and vesting property which had been so given in the King (see *Adams & Lambert's Case*)[1] reflect the change which had then taken place in the religion of the country, as before that date gifts to such uses were valid.[2] Superstitious uses of this kind are still invalid; but whereas formerly a gift partly to a good charitable use and partly to superstitious uses was, as a general rule, altogether void (see Shelford on Mortmain, pp. 93, 99), the rule has, as to Roman Catholic charities under gifts to which the question most frequently arises, been altered by "The Roman Catholic Charities Act," 23 & 24 Vict. c. 134, s. 1.

By this Act it is enacted that: "No existing or future gift or disposition of real or personal estate, upon any lawful charitable trust for the exclusive benefit of persons professing the Roman Catholic religion, shall be invalidated by reason only that

[1] 4 Co. Rep. 96 a, 104 b.

[2] Cro. Eliz. 449; 4 Rep. 113 a; 1 Rep. 23 b.

the same estate has been or shall be also subjected to any trust or provision deemed to be superstitious, or otherwise prohibited by laws affecting persons professing the same religion:" and the Act provides that the estate may be apportioned by the Court, and the proportion fixed by the Court applied to the lawful charitable trusts declared by the donor, the residue to be applied for such lawful charitable trusts for the benefit of persons professing the same religion, as the Court may consider just according to a scheme.

The Act, it will be observed, is retrospective. In *Cary* v. *Abbott*[1] it was held that the testator having devoted the property to a purpose which was charitable, although illegal, the gift should not fail altogether, but be disposed of to such charitable uses as the Crown should by sign manual direct: see too *De Costa* v. *De Pas*,[2] where a bequest to found a Jewish place of worship was dealt with in the same manner. These cases, which can now rarely occur, appear to conflict with the general rule that, when there is a gift to a particular charity which cannot take effect, the heir-at-law or next of kin are entitled.

Where the superstitious uses are not charitable—as bequests for procuring the saying of masses for the testator's soul in perpetuity or otherwise—the

[1] 7 Ves. 490. [2] Amb. 228.

gift is simply void: *West* v. *Shuttleworth*;[1] *Heath* v. *Chapman*;[2] *Blundell's Trusts*;[3] *Sims* v. *Quinlan*.[4]

It would appear that at the Common Law gifts for promoting religious doctrines contrary to the religion of the State, as those of the Roman Catholic Church, *Cary* v. *Abbott*,[5] *De Themmines* v. *De Bonneval*,[6] were invalid, and the statutes passed with the object of prohibiting the teaching of such doctrines are very numerous, as may be seen in the Act 9 & 10 Vict. c. 59, repealing such statutes; but the gifts in those cases would now be held valid, and superstitious uses properly so called appear to be such purposes only as are analogous to those mentioned in the statutes of superstitious uses above referred to: *West* v. *Shuttleworth*;[7] *Heath* v. *Chapman*;[8] *Att.-Gen.* v. *Fishmongers' Co.*[9]

In some cases the question whether a charitable use is created, or whether the property is merely given for purposes of private benevolence, and therefore does not fall within the rules adopted by the Court in relation to charities, is of some nicety.

Thus in the case of *Att.-Gen.* v. *Baxter*,[10] a bequest to Baxter to be distributed by him among sixty pious ejected ministers was held valid as

[1] 2 M. & K. 684.
[2] 2 Drew. 417.
[3] 8 Jur. N.S. 5.
[4] 16 Ir. Ch. R. 195; 17 Ir. Ch. R. 43.
[5] 7 Ves. 490.
[6] 5 Russ. 288.
[7] 2 M. & K. 684.
[8] 2 Drew. 417.
[9] 2 Beav. 151; 5 M. & C. 11.
[10] 1 Ver. 248; 7 Ves. 76.

a gift to individuals; and see *Thomas* v. *Howell*;[1] and see the cases as to bequests to "poor relations," *ante*, p. 22.

"So a bequest to such objects of benevolence and liberality" as D. in his own discretion should most approve, *Morice* v. *Bishop of Durham*,[2] was held not charitable. So in *Ommaney* v. *Butcher*,[3] a gift of residue to be disposed of in private charity was held not a charitable use.

In some cases the gift has failed from the want of sufficient evidence to show an absolute intention on the part of the donor to devote the property to any purpose being a charitable use in the technical sense of that term.

Thus bequests for charitable or public purposes, or to any person or persons as testator's executors "should think fit," *Vezey* v. *Jamson*;[4] "for such charitable or other purposes" as the trustees should think fit, were held not charitable: *Ellis* v. *Selby*;[5] and see *Kendall* v. *Grainger*.[6] But where the "bequest was for such charitable or other public purposes as lawfully might be in the parish of T.," it was held a good charitable use: *Dolan* v. *MacDermot*.[7]

In some cases gifts to charities have been held invalid because the property was partly devoted to

[1] L. R. 18 Eq. 198.
[2] 9 Ves. 399; 10 Ves. 521.
[3] Turner & R. 260.
[4] 1 S. & S. 69.
[5] 7 Sim. 352; affd. 1 My. & C. 286.
[6] 5 B. 301.
[7] L. R. 3 Ch. 676.

objects not charitable, and partly to lawful charities, and it was impossible to ascertain the amount given to each.

It has, however, been recently held that when the property is given to trustees partly for a purpose not lawful, and the residue to a lawful charitable purpose, the whole fund will be given to the lawful charitable purpose: *Hoare* v. *Osborne*;[1] *Fisk* v. *Att.-Gen.*;[2] *Dawson* v. *Small*;[3] *Re Williams*.[4]

So, too, where there was a bequest of a fund to trustees to be invested in freehold mortgage securities for the benefit of charities, which was therefore invalid, and the residue was given to A., held that A. took the whole: *Aston* v. *Wood*.[5]

DISSENTERS, ETC.

Since the passing of the Toleration Act, 1 Wm. & M. c. 18, charitable trusts for promoting the religious opinions of Protestant Dissenters, as for maintaining ministers, chapels or schools, have been held valid and carried into execution by the Courts: *Att.-Gen.* v. *Pearson*;[6] *Att.-Gen.* v. *Cock*;[7] *Waller* v. *Childs*;[8] as to Dissenting schoolmasters, see 19 Geo. 3, c. 44, s. 2; and Unitarians are in this respect on the same footing with other Dissenters, the penalties attached to denial of

[1] L. R. 1 Eq. 585.
[2] L. R. 4 Eq. 521.
[3] L. R. 18 Eq. 714.
[4] 5 Ch. D. 735.
[5] 22 W. R. 893.
[6] 3 Mer. 353.
[7] 2 Ves. Sen. 273.
[8] Amb. 524.

the Trinity having been abolished by 53 Geo. 3, c. 160 : *Shrewsbury* v. *Hornby*.[1]

It seems hardly necessary to say that although it was illegal to devote property to the purpose of promoting doctrines contrary to the established religion, persons professing such doctrines might be the subjects of charitable bequests : *Isaac* v. *Gompertz*, cited in note to *De Costa* v. *De Pas*;[2] *Strauss* v. *Goldsmid*.[3]

The disabilities affecting Roman Catholics with respect to the holding of property for religious, educational, or charitable purposes were removed by 2 & 3 Wm. 4, c. 115, by which Act they are placed on the same footing as Protestant Dissenters : see *Bradshaw* v. *Tasker*;[4] *West* v. *Shuttleworth*;[5] see too Roman Catholic Charities Act, 23 & 24 Vict. c. 134. The statute expressly provides that nothing therein contained shall be taken to repeal or alter the provisions of 10 Geo. 4, c. 7, respecting the suppression or prohibition of the religious orders or societies of the Church : see *Sims* v. *Quinlan*.[6] The disabilities of the Jews have in like manner been removed by 9 & 10 Vict. c. 59.

[1] 5 Ha. 406.
[2] Amb. 228.
[3] 8 Sim. 614.
[4] 2 My. & K. 221.
[5] 2 My. & K. 684.
[6] 16 Ir. Ch. R. 195; 17 Ir. Ch. R. 43.

CHAPTER III.

OF BEQUESTS TO CHARITIES.

It will be observed that, with respect to land or property of the nature described in the Act, dispositions in favour of charities which do not comply with its provisions are declared absolutely void. Money and personal estate not partaking of the nature of land, pure personal estate, may still, as before the passing of the Act, be the subject of a gift to charity by will or unenrolled deed. The chief object and effect of the statute may be said to have been to take away from testators the power previously possessed by them of devising land to charities.

Most of the cases on the construction of the statute have naturally arisen under wills, and it is proposed in this chapter to treat of the property which cannot be given to charity by will, as the decisions on that subject will equally apply to dispositions of similar property which in any other respect offend against the requirements of the statute.

The statute applies to land whether freehold, copyhold (24 & 25 Vict. c. 9, s. 1), or leasehold:

Arnold v. *Chapman*;[1] *Att.-Gen.* v. *Tomkins*;[2] *Att.-Gen.* v. *Graves*;[3] *Doe* v. *Waterton*;[4] and to all charges on or interests in land: *Att.-Gen.* v. *Harley*.[5]

The statute has also been construed as applying to property which partakes of the nature of land generally and spoken of as impure personalty.

Money to arise from the sale of land, *Att.-Gen.* v. *Lord Weymouth*,[6] *Att.-Gen.* v. *Harley*,[7] is clearly within the statute. This is the case even if the sale has been directed by a previous testator under whom the donor to charitable uses claims: *Brook* v. *Badley*.[8] Money, stocks, &c., directed by the will or otherwise to be laid out in the purchase of land are within the express words of the statute, and therefore pecuniary legacies to Queen Anne's Bounty were held invalid on the ground that by the rules of that charity their funds were directed to be laid out in land: *Widmore* v. *Woodroffe*;[9] *Middleton* v. *Clitheroe*;[10] and see *Incorporated Society* v. *Barlow*;[11] and a recommendation by the testator which will amount to a trust to lay out the money in lands will equally render the gift invalid: *Att.-Gen.* v. *Davies*.[12] So too any

[1] 1 Ves. Sen. 108.
[2] Amb. 216.
[3] Amb. 155.
[4] 3 B. & Al. 149.
[5] 5 Mad. 321.
[6] Amb. 19.
[7] 5 Mad. 321.
[8] L. R. 3 Ch. 672.
[9] Amb. 636.
[10] 3 Ves. 734.
[11] 3 D. G. M. & G. 120.
[12] 9 Ves. 535.

bequest in such terms as show that the testator means the trustees to acquire land, as where the money is given to be laid out in or towards building or establishing a hospital or other building for charitable purposes: *Tatham* v. *Drummond*;[1] *Re Lee's Trusts*,[2] where the bequest being for "building and endowing" a church was held void, though in *Sinnett* v. *Herbert*[3] a bequest of pure personalty to trustees for "erecting or endowing" a church was held valid, endowment of a church being a valid object of a charitable bequest; and see *Edwards* v. *Hall*.[4]

In *Philpott* v. *St. George's Hospital*[5] a bequest of money to trustees to be laid out in building for charitable purposes, in case land should at any time be given by any person, was held valid. In this case the testator devised a piece of land to A., who, acting in accordance with the obvious intention of the testator, within a year after his death conveyed it to trustees for the charity. See also *Henshaw* v. *Atkinson*;[6] *Sewell* v. *Crewe-Read*;[7] *Chamberlayne* v. *Brockett*.[8] In *Pratt* v. *Harvey*[9] the rule was stated by Sir John Wickens, V.C., to be well established, that in order to render valid a gift for building a church or other building for

[1] 4 D. G. J. & S. 484.
[2] 21 W. R. 168.
[3] L. R. 7 Ch. 232.
[4] 6 D. G. M. & G. 74.
[5] 6 H. L. C. 338.
[6] 3 Mad. 306.
[7] L. R. 3 Eq. 60.
[8] L. R. 8 Ch. 206.
[9] L. R. 12 Eq. 544; and see *Cox* v. *Dixie*, W. N. 1877, p. 226.

charitable purposes there must be found in the will a reference to an existing site (already in mortmain) on which the building contemplated shall be erected, or "words expressly excluding the application of the money given in the acquisition of land:" see, too, *Hawkins* v. *Allen*.[1] The purchase-money of land contracted to be sold by testator, but remaining unpaid at his death, cannot be bequeathed to charity: *Edwards* v. *Hall*;[2] *Shepherd* v. *Beetham*;[3] *Harrison* v. *Harrison*.[4]

A covenant which is to be satisfied out of land or impure personalty cannot be enforced against a testator's estate in favour of a charity: *Jefferies* v. *Alexander*;[5] *Fox* v. *Lownds*.[6]

The proceeds of growing crops have been held to be impure personalty: *Symonds* v. *Marine Soc.*[7]

Shares in the New River are real estate for all purposes, *Davall* v. *New River Co.*,[8] and cannot be devised to a charity; and Bath Navigation shares have been held to be within the Act: *Howse* v. *Chapman*;[9] but generally speaking, shares in a company, whether incorporated or unincorporated, although the property of the company may consist partially of land—as in the case of railway, dock, or gas companies—are pure personalty: *Myers* v.

[1] L. R. 10 Eq. 246.
[2] 11 Hare, 22.
[3] 6 Ch. D. 597.
[4] 1 R. & M. 71.
[5] 8 H. L. C. 594.
[6] L. R. 19 Eq. 453.
[7] 2 Giff. 325.
[8] 3 D. G. & Sm. 394.
[9] 4 Ves. 542.

Perigal;[1] *Taylor* v. *Linley*;[2] *Edwards* v. *Hall*;[3] *Ashton* v. *Ld Langdale*;[4] *Walker* v. *Milne*.[5]

In *Entwisle* v. *Davis*,[6] it was held by V.-C. Wood that shares in a company formed for the purpose of purchasing land and reselling &c., or letting it, were not within the Act.

The last case conflicts with *Morris* v. *Glyn*,[7] but appears to be in accordance with the other decisions above referred to; see *Hayter* v. *Tucker*.[8]

Tithes, being hereditaments, could not, of course, be devised to a charity; and a bequest of a fund to be laid out in the purchase of tithes, to be revested in the Church of England, is void: *Denton* v. *Ld. Manners*.[9]

Although, where a bequest to a charity is directed to be laid out in land, it will, as we have seen, be invalid; yet where the trustees have a discretion either so to lay it out or to apply it in a manner not prohibited by the Act, it will be valid, as it will be presumed that the trustees will act in a lawful manner: *Mayor of Faversham* v. *Ryder*,[10] *Salisbury* v. *Denton*,[11] *Univ. of London* v. *Yarrow*,[12] *Lewis* v. *Allenby*;[13] and see *Church Bdg. Soc.* v.

[1] 2 D. G. M. & G. 599.
[2] 29 L. J. Ch. 534; 2 D. F. & J. 84.
[3] 6 D. G. M. & G. 74.
[4] 4 D. G. & Sm. 402.
[5] 11 Beav. 507.
[6] L. R. 4 Eq. 272.
[7] 27 Beav. 218.
[8] 4 K. & J. 243.
[9] 2 D. G. & J. 675.
[10] 5 D. G. M. & G. 350.
[11] 3 K. & J. 529.
[12] 1 D. G. & J. 72.
[13] L. R. 10 Eq. 668.

Barlow;[1] and the illegal application of the fund may be restrained by the Court: *Carter* v. *Green*.[2]

The principal money and interest secured by mortgages of land are alike within the Act, and cannot be given by will to a charity: *Att-Gen.* v. *Caldwell*,[3] *Currie* v. *Pye*,[4] *Alexander* v. *Brame*;[5] and money cannot be given to pay off a mortgage on lands in mortmain: *Corbyn* v. *French*,[6] *Waterhouse* v. *Holmes*;[7] though it is otherwise where the debt is not a charge on the land: *Bunting* v. *Marriott*.[8]

As a direction to purchase land renders a bequest to charity invalid, a bequest of money to be invested on "mortgage" for the benefit of a charity is void: *Baker* v. *Sutton*,[9] see *Graham* v. *Paternoster*.[10]

By 33 & 34 Vict. c. 34 (1st Aug. 1870), corporations and other trustees for charities are empowered to invest the trust moneys on any real security "authorized by or consistent with the trusts on which such moneys are held," without complying with the conditions and solemnities of the Mortmain Act.

Sect. 2 directs that in such cases the charity shall be entitled to a sale and not to foreclosure, and that

[1] 3 D. G. M. & G. 120.
[2] 3 K. & J. 591.
[3] Amb. 635.
[4] 17 Ves. 462.
[5] 30 Beav. 153; 7 Jur. N.S. 889.
[6] 4 Ves. 418.
[7] 2 Sim. 162.
[8] 19 Beav, 163.
[9] 1 Keen, 224.
[10] 31 Beav. 30.

when, by release or otherwise, the equity of redemption is barred, the land shall be held on trust for sale.

By this Act it is declared, s. 1, that in so investing the charitable funds the trustees shall not be deemed to acquire any interest in land within the meaning of the "Mortmain Act;" but the inability of testators to bequeath money invested on mortgage or interest, or money to be so invested for the benefit of a charity, appears unaltered: *Aston* v. *Wood*.[1]

Of course a gift by will of future rents and profits is equivalent to a gift of the land, and therefore void; but arrears of rent may be bequeathed to charity: *Edwards* v. *Hall*.[2]

A bequest of pure personal estate may fail through the purpose for which it is given being inseparable from a devise forbidden by the Act: as where houses were devised for the poor of a parish, and the interest of money for repair of the houses, the former gift failing, the latter became inoperative: *Att.-Gen.* v. *Goulding*;[3] *Att.-Gen.* v. *Whitchurch*;[4] *Att.-Gen.* v. *Hinxman*.[5]

A bequest of money to be laid out in building, or in repair of buildings existing on land already in mortmain, is clearly valid: *Att.-Gen.* v. *Parsons*,[6]

[1] 22 W. R. 893.
[2] 11 Hare, 6; 6 D. G. M. & G. 74.
[3] 2 Bro. C. C. 428.
[4] 3 Ves. 141.
[5] 2 J. & W. 270.
[6] 8 Ves. 186.

Fisher v. *Brierly*,[1] *Harris* v. *Barnes*,[2] *Att.-Gen.* v. *Bp. of Chester*.[3]

The legacy duty payable in respect of a bequest to a charity cannot be paid out of impure personalty: *Wilkinson* v. *Barber*.[4] But by 42 Geo. 2, c. 16, money may be bequeathed for redeeming the land-tax on any lands held upon charitable trusts.

The decisions as to some of the classes of property which have been held subject to the provisions of the Act as being "impure personalty" are at present somewhat conflicting. The Act, it will have been observed, prohibits dispositions to charities of "manors, lands, tenements, rents, advowsons, or other hereditaments," or "any estate or interest therein," or any charge or incumbrance affecting or to affect any lands, tenements, or hereditaments, or of "stock, money, goods, chattels, or other personal estate to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments."

Money charged on turnpike tolls: *Knapp* v. *Williams*,[5] *Tyrrell* v. *Whinfield*;[6] dock dues: *Alexander* v. *Brame*;[7] tolls of a lighthouse or harbour: *Att.-Gen.* v. *Jones*,[8] *Ion* v. *Ashton*;[9] mortgage of borough rates: *Thornton* v. *Kempson*;[10]

[1] 1 D. G. F. & J. 643.
[2] Amb. 650.
[3] 1 Bro. C. C. 444.
[4] L. R. 14 Eq. 96.
[5] 4 Ves. 430 (n.).
[6] W. N. 1877, p. 99.
[7] 30 Beav. 153.
[8] 1 M. & G. 574.
[9] 28 Beav. 379.
[10] Kay, 592.

of poor rates: *Finch* v. *Squire*;[1] metropolitan stock: *Cluff* v. *Cluff*;[2] mortgages by Improvement Commissioners charging the works, rents, and rates: *Chandler* v. *Howell*;[3] have all been held property of the nature of or interests in land, and bequests of such property to charity been held void accordingly. But in *Holdsworth* v. *Davenport*,[4] and in the case of *Mitchell* v. *Moberly*,[5] debentures in the form in Schedule C. to the Companies Clauses Consolidation Act, 1845, have recently been held not to be within the Act. The decisions in these cases are, however, expressly founded on the decision in the earlier case of *Gardner* v. *L. C. & D. Ry.*,[6] to the effect that such debentures did not enable the mortgagees to sell the undertaking, or create a charge on the superfluous lands of the company, or the proceeds of sale of such lands, but were merely mortgages of the undertaking as a going concern, entitling the mortgagees to have a receiver appointed of the tolls.

The superfluous lands of a railway company do not appear to form part of the undertaking, and the fact that a debenture creates merely a mortgage of the undertaking as a going concern, so that the debenture holders are not entitled to put an end to the undertaking by sale or otherwise, does not seem to be conclusive as shewing that the tolls on

[1] 10 Ves. 41.
[2] 2 Ch. D. 222.
[3] 4 Ch. D. 651.
[4] 3 Ch. D. 185.
[5] 6 Ch. D. 655.
[6] L. R. 2 Ch. 201.

which the debentures are charged are not an interest in land, and the decisions are inconsistent with the earlier decision of *Ashton* v. *Lord Langdale*;[1] and see *Cramp* v. *Playfoot*;[2] and the observations of V.-C. Sir Chas. Hall in *Chandler* v. *Howell*.[3] And in *Attree* v. *Hawe*[4] it has been held by the Judge last referred to that debenture stock of a railway company cannot be bequeathed to a charity.

SECRET TRUSTS.

Of course the Statute of Mortmain cannot be evaded by means of a secret trust. Thus in *Springett* v. *Jenings*,[5] where testatrix having by deed enrolled conveyed lands to trustees for a charity, by her will devised the same lands in case she should not in her lifetime have effectually disposed thereof to two persons (who were two of the trustees named in the deed) as joint tenants, and died within twelve calendar months after execution of the deed, the devise was held void, the devisees not denying the secret trust.

But the onus of proving that property devised was in fact given upon a secret trust for charities lies on the persons seeking to impeach the devise, and they must shew not only that the testator intended to create a trust for charity, but that

[1] 4 D. G. & Sm. 402, 413.
[2] 4 K. & J. 479.
[3] 4 Ch. D. 651.
[4] W. N. 1877, p. 227.
[5] L. R. 10 Eq. 488.

such intention was known and assented to by the devisees: *Jones* v. *Badley*;[1] see *Wallgrave* v. *Tebbs*.[2]

Where there is a devise upon a secret trust for a charity the legal estate passes to the devisees; but the devise will be set aside in Equity as a fraud on public policy: *Sweeting* v. *Sweeting*.[3]

[1] L. R. 3 Eq. 635; 3 Ch. 362.

[2] 2 K. & J. 313.

[3] 3 N. R. 240.

CHAPTER IV.

OF ALIENATIONS TO CHARITIES INTER VIVOS.

THE Act 9 Geo. 2, c. 36, requires for the validity of a voluntary conveyance to charity of property falling within the description contained in the Act, as to which see preceding chapter, that it shall be by deed (indenting is no longer required) sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor (including the days of the execution and death), and shall be enrolled in Chancery within six calendar months after the execution.

Transfers of stocks to be laid out in the purchase of lands are to be made six calendar months before the death of the donor or grantor (including the days of transfer and death).

All conveyances and transfers are to be made to take effect in possession, for the charitable use intended, immediately from the making thereof, and be without any power of revocation, reservation, trust or condition, limitation, clause or agree-

ment whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him.

The provision requiring conveyances of land, &c., to be executed twelve months before the death of the grantor, or transfers of stocks to be executed six months before such death, do not apply to purchases for value, s. 10. As to death of the grantor within twelve months after the execution of the conveyance, see *Price* v. *Hathaway*;[1] *Hawkins* v. *Allen*,[2]

Voluntary conveyances of lands as sites for schools are by 4 & 5 Vict. c. 38, and 7 & 8 Vict. c. 37, s. 3, rendered valid, though the grantor die within twelve months. See, too, 12 & 13 Vict. c. 49, s. 4; 15 & 16 Vict. c. 49, containing similar provisions as to sites for schools, "for masters and mistresses of elementary schools," and for "schools or colleges for religious or educational training of the sons of yeomen, tradesmen, or others, or for the theological training of candidates for holy orders, which are erected or maintained in part by charitable aid."

Conveyances, whether voluntary or for value, must be attested by two witnesses: *Doe* v. *Munro*;[3] *Wickham* v. *Marquis of Bath*.[4] But as to conveyances for value, a defect of this kind is cured by

[1] 6 Mad. 304.
[2] L. R. 10 Eq. 246.
[3] 12 M. & W. 482.
[4] L. R. 1 Eq. 17.

enrolment, see 24 Vict. c. 9, s. 3 (retrospective); see, too, 25 & 26 Vict. c. 17; 27 Vict. c. 13; 29 & 30 Vict. c. 57; 35 & 36 Vict. c. 24.

The provisions as to enrolment extended equally to voluntary conveyances and conveyances for value, *Att.-Gen.* v. *Gardner*.[1] But a series of Acts have extended the time for enrolment in the case of conveyances for value: see 9 Geo. 4, c. 85 (retrospective only); 24 Vict. c. 9, s. 3; 25 & 26 Vict. c. 17; 27 Vict. c. 13; 29 & 30 Vict. c. 57; 35 & 36 Vict. c. 24, by the last of which Acts, s. 13, without any order of the Court, deeds inadvertently omitted to be enrolled may be enrolled by the Clerk of the Court on an affidavit shewing the facts. As to enrolling any subsequent deed shewing the trusts, where the original trust deed has been lost, see 27 Vict. c. 13, s. 3; 29 & 30 Vict. c. 57; and 35 & 36 Vict. c. 24, s. 13.

In the case of conveyances for value, the objection to a deed founded on the want of enrolment can, therefore, where the omission to enrol has arisen from inadvertence, now be cured at any time.

Enrolment is optional in the case of conveyances to trustees for religious or educational purposes under 31 & 32 Vict. c. 44, of land not exceeding two acres (s. 2). As to enrolment of deeds in

[1] 2 D. G. & S. 102.

the case of Roman Catholic charities, see 23 & 24 Vict. c. 134 (Roman Catholic Charities Act).

By the Act 24 Vict. c. 9, ss. 2, 4, where there are two deeds, the one conveying the property to charity, the other declaring the trusts, the enrolment of the latter is declared sufficient; and see 25 & 26 Vict. c. 17, s. 4; 27 Vict. c. 13, s. 2.

Where property is held upon charitable trusts, under a deed duly enrolled, subsequent deeds dealing with the property do not require enrolment: *Att.-Gen* v. *Glyn*;[1] *Ashton* v. *Jones*.[2]

By 25 & 26 Vict. c. 17, it is also enacted, s. 5, that money expended before the passing of the Act in building or permanent improvement is to be deemed equivalent to money paid for purchase of the land.

No deed requires acknowledgment before being enrolled, 25 & 26 Vict. c. 17, s. 3; 29 & 30 Vict. c. 37, s. 2; 31 & 32 Vict. c. 44, s. 3.

Conveyances are to take effect in possession, but as to leases, it is sufficient if the term is to commence within one year: 26 & 27 Vict. c. 106.

No power of revocation, benefit, &c., is to be reserved to the grantor: *Way* v. *East*.[3] A resulting trust for the grantor for life or otherwise invalidates the deed: *Limbrey* v. *Gurr*;[4] *Morris*

[1] 12 Sim. 84.
[2] 28 Beav. 460; 6 Jur. N.S. 970.
[3] 2 Drew. 44.
[4] 6 Mad. 151.

v. *Owen*;[1] and see *Wickham* v. *Marquis of Bath*.[2]

But the fact that the deed is retained by the vendor does not invalidate it, though he may have remained in occupation of the land: *Fisher* v. *Brierley*.[3]

And the donor may reserve the right to regulate the charity: *Grieves* v. *Case*.[4]

The consideration on sale to a charity may consist, wholly or partly, of a rent-charge to be reserved to the grantor: 24 Vict. c. 9, ss. 1, 3; 25 & 26 Vict. c. 17, s. 2; 27 & 28 Vict. c. 15, s. 4.

Deeds conveying land to charity are declared not to be invalid by reason of a nominal rent, or mines, minerals, or easements being reserved; and a conveyance to charity is not to be rendered invalid by containing "covenants or provisions as to erection or repair, position or description of buildings, or formation or repair of streets or roads, drainage, or nuisances, or any covenants or provisions of a like nature," for the use and enjoyment, as well of the hereditaments comprised in such assurance, as of any other adjacent or neighbouring hereditaments, or any right of entry, on non-payment of such rent, or on trust of any such covenant or provision, or any stipulations of

[1] W. N. 1875, p. 132.
[2] L. R. 1 Eq. 17.
[3] 10 H. L. C. 159; S. C. 1 D. G. F. & J. 643.
[4] 2 Cox, 301.

the like nature for the benefit of the donor or grantor, or of any person or persons claiming under him."

The grantor is, however, to reserve the same benefits to his representatives as to himself: 24 Vict. c. 9, s. 1.

CHAPTER V.

CONSTRUCTION OF ALIENATIONS TO CHARITIES.

GIFTS to charity which do not infringe the provisions of the Mortmain Act are favoured by the Court.

Thus a bequest to charity, however general in terms, will not be void for uncertainty, but will be carried into effect by means of a scheme: *Bp. of Hereford* v. *Adams*;[1] *Morice* v. *Bp. of Durham*;[2] *Att.-Gen.* v. *Herrick*;[3] *Dolan* v. *Macdermot*;[4] *Wilkinson* v. *Lindgren*;[5]

If a bequest is equally capable of two constructions, of which the one will render it invalid, the other being a good charitable use, the latter will be adopted: *Bruce* v. *Presbytery of Deer*.[6]

In favour of a charity, a power well exercised in other respects, though not complying with the formalities required for execution, will be deemed effectively exercised: *Innes* v. *Sayer*.[7]

As all charities must be for the public benefit,

[1] 7 Ves. 324.
[2] 9 Ves. 399-405.
[3] Amb. 712.
[4] L. R. 3 Ch. 676.
[5] L. R. 5 Ch. 570.
[6] L. R. 1 Sc. App. 96.
[7] 3 M. & G. 606; 7 Ha. 377.

a conveyance to a charity, though voluntary, does not appear to be like an ordinary voluntary settlement, and therefore capable of being set aside by a subsequent conveyance to a purchaser for value: *Att.-Gen.* v. *Corporation of Newcastle.*[1] See, however, the observations of Lord St. Leonards on this case, V. & P., 14th ed., p. 417; *Trye* v. *Corporation of Gloucester.*[2]

Where a testator bequeaths pure personal estate to such charities as shall be named by him in a codicil, or as A. shall appoint, or as have been named by him in a writing, the gift is valid, though no codicil be executed, or appointment made, or no writing can be found, and will be carried into effect by the Court by means of a scheme: *Att.-Gen.* v. *Syderfin*;[3] *Commissioners of Char. Don.* v. *Cotter*;[4] *Att.-Gen.* v. *Fletcher*;[5] *Mills* v. *Farmer*;[6] *Pocock* v. *Att.-Gen.*[7] See also *Yates* v. *Univ. College*;[8] *Aston* v. *Wood.*[9]

So where a testator, after bequeathing a definite sum to charities, left blanks in his will for the names of the charities and the sums to be paid to each, the gift was held void: *Pieschel* v. *Paris.*[10] But where the sum to be divided among the

[1] 5 Beav. 307; 12 Cl. & F. 402.
[2] 14 Beav. 181–182.
[3] 7 Ves. 43 (n.).
[4] 1 Dr. & W. 501.
[5] 5 L. J. (N.S.) Ch. 75.
[6] 1 Mer. 55.
[7] 3 Ch. D. 350.
[8] L. R. 8 Ch. 454; 7 H. L. 438.
[9] L. R. 6 Eq. 419.
[10] 2 S. & S. 384.

charities is left in blank, the gift will of course fail: *Hartshorne* v. *Nicholson.*[1] See, too, *Ewen* v. *Bannerman.*[2]

Where a sum is given to charities, or to charities and individuals, in proportions to be fixed by the trustees, the Court will not interfere with the exercise of their discretion: *Lewis* v. *Allenby.*[3] But if they neglect to exercise it, the fund will be distributed by the Court: *Salusbury* v. *Denton*;[4] *Reeve* v. *Att.-Gen.*[5]

It very often occurs that a testator incorrectly describes the charity he intends to benefit, and the legacy is consequently claimed by two or more charities.

In such cases parol evidence is admissible to shew that the description, though not strictly accurate, is sufficient to make it clear that a particular charity is intended: *Kilvert's Trusts*;[6] and if any ambiguity is raised by parol evidence shewing that more than one charity will sufficiently answer the description, that ambiguity may be removed by extrinsic evidence as to which of the societies the testator knew, and to which he subscribed in his lifetime, or expressed an intention to benefit: *Kilvert's Trusts*;[7] and see Wigram on Extrinsic Evidence, Prop. vii., s. 184, p. 160;

[1] 26 Beav. 58.
[2] 2 Dow. & Cl. 74.
[3] L. R. 10 Eq. 668.
[4] 3 K. & J. 529.
[5] 3 Ha. 191.
[6] L. R. 7 Ch. 170.
[7] *Supra.*

Charter v. *Charter*.[1] The rule being that evidence of surrounding circumstances is in all cases admissible to shew the sense in which a testator uses expressions in his will, and that evidence of his intention as shewn by declarations, &c., is admissible in those cases, and in those cases only, where the description used by him equally applies with legal certainty to each of several persons or things the subject of the gift contained in his will: see Wigram, 161.

In some cases the Court will divide the bequest between two or more societies. Thus in the case *Re Alchin's Trusts*,[2] a bequest to the Kent County Hospital, there being no hospital of that name, was divided between two general hospitals in the county of Kent: see *Bennett* v. *Hayter*.[3]

Instead of adopting the course followed in the cases last referred to, the Court will in general, where the charity intended to be benefited by the testator cannot be identified with certainty, apply the gift *cy-près*: *Loscombe* v. *Wintringham*;[4] *Simon* v. *Barber*;[5] *Re Clergy Society*;[6] *Re Maguire*;[7] and will direct a scheme if necessary: *Re Clergy, Society*.[8]

Where a bequest is made to a permanent charitable society as part of their general funds,

[1] L. R. 7 H. L. 364–370.
[2] L. R. 14 Eq. 230.
[3] 2 Beav. 81.
[4] 13 Beav. 87.
[5] 5 Russ. 112.
[6] 2 K. & J. 615.
[7] L. R. 9 Eq. 632.
[8] *Supra*.

no scheme is required: *Society for the Propagation of the Gospel in Foreign Parts* v. *Att. Gen.*;[1] *Walsh* v. *Gladstone*.[2] But where a permanent charitable object is intended, and the bequest is to persons having no corporate character (*Wellbeloved* v. *Jones*[3]), or the trusts declared are not those on which the funds of the charity are held, a scheme is required: *Corporation of Sons of the Clergy* v. *Mose*.[4]

A scheme also is directed in cases where the trusts are for charity generally, or from the alteration of circumstances they have become altogether or partially inapplicable, as where the particular charity named has ceased to exist, or the value of the property has increased, so as to be more than is required to carry out the objects specified by the founder: *Philpotts* v. *St. George's Hospital*;[5] *Re Ashton*;[6] *Mayor of Lyons* v. *Adv.-Gen. of Bengal*.[7]

The object of a scheme being to carry out the intention of the creator of the charity as nearly as the circumstances will admit, it is obviously impossible to lay down any very precise rules as to the mode in which the Court exercises its discretion.

So long as the trusts declared by the creator of the charity are capable of being executed, the Court

[1] 3 R. 142
[2] 1 Ph. 290.
[3] 1 S. & S. 40.
[4] 9 Sim. 610.
[5] 27 Beav. 107–111.
[6] Ibid.
[7] 1 App. Cases, 91.

has no authority to vary them, although it may think that the charity estate might be more beneficially applied: *Att.-Gen.* v. *Sherborne School*;[1] *Att.-Gen.* v. *Corporation of Rochester*.[2]

Where, however, from the increase in the value of the property of the charity, or from any cause, the trusts are partially inapplicable, the Court in directing a scheme will carry out the intentions of the founder as nearly as the altered circumstances will allow: *Att.-Gen.* v. *Corporation of Rochester*;[3] *Re Lambeth Charities*;[4] *Att.-Gen* v. *Duke of Northumberland* (*Smith's Poor Kin Charity*).[5]

Where property is given to several charitable uses, some of which fail, the Court does not necessarily give the part which has failed to the others: *Att.-Gen.* v. *Ironmongers' Co.*[6] A scheme which has been sanctioned by the Court may be afterwards altered if it is found desirable: *Att.-Gen.* v. *St. John's Hospital, Bath.*[7]

Where, however, the charitable trust has wholly failed, as in the cases where funds were to be applied in release of Christian prisoners in Turkey or Barbary, or prisoners for debt: *Att.-Gen.* v. *Ironmongers' Co.*;[8] *Re Prison Charities*;[9] a scheme may be directed which in no way resembles the

[1] 18 Beav. 256, 280.
[2] 5 D. G. M. & G. 797.
[3] *Supra.*
[4] 22 L. J. (N.S.) Ch. 598.
[5] W. N. 1877, p. 246.
[6] Cr. & P. 208; 10 Cl. & F. 908.
[7] L. R. 1 Ch. 92.
[8] 2 M. & K. 576.
[9] L. R. 16 Eq. 129.

objects within the intention of the founder. Where it is uncertain whether the particular object can ever be carried out the fund may be directed to be retained in Court, and inquiries directed, or liberty to apply given: *Att.-Gen.* v. *Bishop of Chester*;[1] *Baldwin* v. *B.*;[2] *Sinnett* v. *Herbert*;[3] *Chamberlayne* v. *Brockett*.[4]

In the case last cited it was contended that the bequest was void for remoteness, as not limited to take effect within the period allowed by law against perpetuities. It was, however, held that the gift to charity was immediate, the mode of execution only being made dependent on future events.

In *Christ's Hospital* v. *Granger*,[5] where there was a bequest to the corporation of Reading upon trusts for the poor of Reading, with a gift over to the corporation of London for the benefit of Christ's Hospital if the corporation of Reading should for a year neglect to perform the direction of the will, the latter gift was held valid.

A trust, whether for a charity or for individuals, will not fail by reason of the failure of a trustee, as by incapacity to take, or his death in the life-time of the testator, or by the renunciation of an executor, or revocation of his appointment, or by the disclaimer of a trustee: *Sonley* v. *Clockmakers'*

[1] 1 Br. C. C. 444.
[2] 22 Beav. 419.
[3] L. R. 7 Ch. 232.
[4] L. R. 8 Ch. 206.
[5] 1 M. & G. 460.

Co.;[1] *White* v. *W.*;[2] *Att.-Gen.* v. *Fletcher*;[3] *Walsh* v. *Gladstone*;[4] *Marsh* v. *Att.-Gen.*[5]

If the charity to which a bequest is made ceases to exist after the death of the testator the bequest will be applied *cy-près*: *Incorporated Society* v. *Price*;[6] *Hayter* v. *Treyo*;[7] *Bunting* v. *Marriott*;[8] and see *Re Clark*.[9] But where a testator bequeaths property to a particular charity which ceases to exist in his lifetime, or from any other cause the particular charitable object is *ab initio* incapable of taking effect, the gift will fail; there being no evidence of a general charitable intention, the fund cannot be applied *cy-près*: *Att.-Gen.* v. *Whitchurch*;[10] *Att.-Gen.* v. *Hinxman*;[11] *Cherry* v. *Mott*;[12] *Russell* v. *Kellett*;[13] *Clark* v. *Taylor*;[14] *Fisk* v. *Att.-Gen.*;[15] *Re Maguire*;[16] *Sims* v. *Quinlan*.[17]

Where property is given to charity generally, no trustees being named or objects selected, the Court has not the power of sanctioning a scheme without the consent of the Crown by sign manual: see *Att.-Gen.* v. *Fletcher*,[18] *Reeve* v. *Att.-Gen.*,[19] *Kane* v.

[1] 1 Br. C. C. 81.
[2] 1 Br. C. C. 12.
[3] 5 L. J. (N.S.) Ch. 75.
[4] 1 Ph. 290.
[5] 2 J. & H. 61.
[6] 1 J. & L. 498.
[7] 5 Russ. 113.
[8] 19 Beav. 163.
[9] 1 Ch. D. 497.
[10] 3 Ves. 141.
[11] 2 J. & W. 270.
[12] 1 M. & C. 123.
[13] 3 Sm. & G. 264.
[14] 1 Drew. 642.
[15] L. R. 4 Eq. 521.
[16] L. R. 9 Eq. 632.
[17] 16 Ir. Ch. R. 195; affd. 17 Ir. Ch. R. 43.
[18] 5 L. J. (N.S.) Ch. 75.
[19] 3 Ha. 191.

Cosgrove,[1] where the form of the petition and letters missive under the sign manual are given.

It seems hardly necessary to say that where the charitable objects specified by a testator do not require the whole of the fund which he has shewn an intention to give to charity, the Court will, as in the case of no particular objects being named, apply the residue of the fund *cy-près*: *Att.-Gen.* v. *Earl of Winchelsea*;[2] *Bishop of Hereford* v. *Adams*.[3] And where property is given, not for the purposes of individual benefit, but for the performance of duties (being a charity) an increase of revenue must be applied *cy-près*: *Att.-Gen.* v. *Brentwood School*.[4]

Difficulty has sometimes arisen from the fact of a testator not taking into consideration the probable increase in the value of the property, and making such a disposition of the income as though adequate to exhaust it at the time of his death has since become totally inadequate.

Where, in such cases, the testator has specified charitable objects which at the date of the will entirely exhausted the income, the increased value will also be held to have been devoted to charity; in other words, a charitable trust of the whole property is created. But cases have occurred like the *Thetford School Case*,[5] in which the question arises whether the testator intended the devisees to

[1] Ir. Rep. 10 Eq. 211.
[2] 3 Br. C. C. 373.
[3] 7 Ves. 324.
[4] 1 M. & K. 376-394.
[5] 8 Co. Rep. 130 b.

take the property beneficially charged only with certain payments to charity. If the charitable objects named by the testator do not exhaust the then income of the property, and no disposition of the surplus is made, such surplus and all augmentations arising from the increased value of the property will go to the devisees: *Att.-Gen.* v. *Mayor of Bristol.*[1] Where there is a disposition of the surplus which may or may not exhaust such surplus at the date of the gift, the question whether any increased surplus belongs to charity or to the devisees is one of intention to be gathered from the particular will. Where the surplus is directed to be applied in a manner essential to the continuance of the charities, as to reparations of the property, such direction clearly shews an intention to devote the whole of the then income to the charities, and a trust of the whole increased value of the property for charities will be held to have been created: *Att.-Gen.* v. *Wax Chandlers' Co.*;[2] *Merchant Taylors' Co.* v. *Att.-Gen.*;[3] and see *Att.-Gen.* v. *Coopers' Co.*[4] In the case of the *Att.-Gen.* v. *Wax Chandlers' Co.*, by the will of William Kendall, a liveryman of the company, real estate was in 1558 devised in remainder, after an estate tail which failed, to the Wax Chandlers' Co. and their successors, "for this intent and purpose and upon this condition" that they should yearly distribute

[1] 2 J. & W. 294, 332.
[2] L. R. 6 H. L. 1.
[3] L. R. 6 Ch. 512.
[4] 3 Beav. 29.

eight pounds in the manner therein described, viz., to the poor of the parish of Mary Magdalen, at Old Fish Street end, four pounds, lacking two shillings, for gowns for men and women, and coals at the discretion of the churchwardens, and the said two shillings to the said churchwardens for their painstaking, and after a similar gift to the poor of the parish of Bexley, the testator directed thirty-five shillings to be distributed unto the poorest men and women of the Company of Wax Chandlers, and the other five shillings to be distributed to the Master and Wardens of the Wax Chandlers for the time being equally; the rest of the profits the testator directed to be bestowed upon the reparation of the houses and tenements, and the will contained a gift over of the property on failure of the company to comply with the testator's directions to the testator's next of kin and his heirs, upon condition "that he and they and every of them do all these things above rehearsed in all points as it is above rehearsed by me."

The property was destroyed in the great fire of London, and rebuilt by the company. The rents of the property largely increased, and the increase was applied by the company for their own benefit.

It was held that a trust of the whole property for charity was created, and the increase was directed to be applied *cy-près*. Held, also, that the trust for reparation extended to rebuilding, if necessary.[1]

[1] L. R. 6 Ch. 512.

The will was very similar in terms in *Merchant Taylors' Co.* v. *Att.-Gen.*, and the decision in that case also gave the whole increase to charity. The perusal of these cases shews that in every case the question is one of intention, which must in each case be gathered from the words of the particular instrument, and the surrounding facts, and see Tudor on Charities, 237, 238.

In *Chapman* v. *Brown*,[1] and *Cramp* v. *Playfoot*,[2] and other cases, it was held that where after a gift of a fund for a purpose which was void, as building a church or almshouses, there was a gift of any surplus to charity, the latter gift was also void as being of an unascertainable amount.

But in *Fisk* v. *Att.-Gen.*,[3] and *Dawson* v. *Small*,[4] and in *Re Williams*,[5] it has in effect been decided that the first gift being void the whole fund went to charity. The effect of these decisions, however, seems to be to take from the next of kin that which was not disposed of by the will, and they can hardly be considered as conclusively overruling the earlier decisions. In the case of *Att.-Gen.* v. *Hinxman*,[6] already referred to, a bequest of money, the income of which was to be paid to a schoolmaster residing in a house devised by the same will as a residence for the master that might be appointed to a school, was held so connected with

[1] 6 Ves. 404.
[2] 4 K. & J. 479.
[3] L. R. 4 Eq. 521.
[4] L. R. 18 Eq. 114.
[5] 5 Ch. D. 735.
[6] 2 J. & W. 270.

the void devise as to fail, and a gift of the residue to the poor also failed; see, too, *Att.-Gen.* v. *Goulding*.[1]

The Court does not in any way marshal to arrange the assets, so as to give indirectly to a charity that which cannot legally be given to it. Where, therefore, there is a general charge of debts and legacies, they are not thrown on the real estate, or the real estate and personal estate savouring of realty, so as to leave the pure personal estate for the charities: *Ridges* v. *Morison*;[2] *Cherry* v. *Mott*;[3] *Hobson* v. *Blackburn*;[4] *Philanthropic Society* v. *Kemp*;[5] and see *Brook* v. *Badley*.[6] And it follows necessarily that wherever the fund for payment of legacies consists partly of property which cannot be given by will to charity, as in the usual case of a testator's residuary personalty, consisting partly of personalty which savours of realty, the charitable legacies, whether pecuniary or residuary, will fail in the proportion borne by such impure personalty to the pure personal estate; see *Beaumont* v. *Oliveira*;[7] *Miles* v. *Harrison*;[8] and see decree in *Williams* v. *Kershaw*.[9]

So where testator devises and bequeaths his real and personal estate upon trust for sale and pay-

[1] 2 Br. C. C. 427.
[2] 1 Cox, 180.
[3] 1 My. & Cr. 123.
[4] 1 Keen, 273.
[5] 4 Beav. 581.
[6] L. R. 3 Ch. 672.
[7] L. R. 4 Ch. 309.
[8] L. R. 9 Ch. 316.
[9] 1 Seton on Decrees, 4th ed. 589.

ment of debts and legacies, the real estate and the pure and impure personal estate will contribute rateably to the payment of debts and legacies other than charitable, the residue of the pure personalty only being applicable for the charities: *Howse* v. *Chapman*;[1] *Robinson* v. *London Hospital*;[2] *Edwards* v. *Hall*.[3] But a testator may himself direct his assets to be marshalled in favour of the charities: *Gaskin* v. *Rogers*;[4] *Wigg* v. *Nicholl*.[5]

Where the will merely directs that a pecuniary legacy shall be paid out of such part of testator's personal estate as may by law be applied to that purpose, the effect is only to make such legacy payable in priority to other legacies out of such part of the pure personal estate as forms part of the residue after such pure personal estate has contributed rateably with impure personalty to the payment of debts and other charges: *Tempest* v. *Tempest*;[6] *Beaumont* v. *Oliveira*;[7] *Llewellyn* v. *Rose*.[8]

A testator may, however, as between persons claiming under his will direct his real estate and personal estate savouring of realty (impure personalty), to be first applied towards payment of his debts, funeral and testamentary expenses, so as to reserve such part of his residuary estate as consists of pure personalty for charities; though

[1] 4 Ves. 542.
[2] 10 Ha. 29.
[3] 11 Ha. 22.
[4] L. R. 2 Eq. 284.
[5] L. R. 14 Eq. 192.
[6] 7 D. G. M. & G. 470.
[7] L. R. 4 Ch. 309.
[8] W. N. 1869, 178.

of course such a direction does not affect the rights of creditors: *Wills* v. *Bourne*;[1] *Miles* v. *Harrison*;[2] *Re Fitzgerald*.[3] In *Shepherd* v. *Beetham*[4] the pure personal estate was held to be specifically bequeathed to charity.

In determining the proportion borne by the impure personal estate to the pure personalty for the purpose of ascertaining the amount to which charitable legacies must abate, regard is to be had to the state of circumstances existing at testator's death: *Calvert* v. *Armitage*.[5]

Where the trustees to whom the property is given for charitable purposes have, either under the will or otherwise, an option to apply it to objects within the Mortmain Act, which would render the gift invalid, or to objects not within that Act, the bequest is, as already observed, valid: *Grimmett* v. *G.*,[6] *Mayor of Faversham* v. *Ryder*,[7] *Univ. of London* v. *Yarrow*,[8] *Wilkinson* v. *Barber*,[9] and the Court will compel them, if necessary, to execute their option in such a manner as not to defeat the gift: *Carter* v. *Green*.[10]

In *Lewis* v. *Allenby*,[11] where there was a bequest of residue consisting of impure and pure personal estate to trustees, to be divided among such chari-

[1] L. R. 16 Eq. 487.
[2] L. R. 9 Ch. 316.
[3] W. N. 1877, p. 216.
[4] 6 Ch. D. 597.
[5] 1 H. & M. 446.
[6] Amb. 210.
[7] 5 D. G. M. & G. 350.
[8] 1 D. G. & J. 72.
[9] L. R. 14 Eq. 96.
[10] 3 K. & J. 591.
[11] L. R. 10 Eq. 66.

ties as they should in their absolute discretion think proper, it was held that the trustees were bound to give the impure personalty to such charities as were lawfully capable of taking it, and the gift was therefore valid.

Property of which the disposition fails by reason of its offending against the provisions of the Mortmain Act, in the case of a will fails as undisposed of; and in the case of wills made before the Wills Act, goes to the heir; if made subsequent to the same Act, to the residuary devisee, if any, otherwise to the heir; the personal estate, of the nature of real estate, to the residuary legatee or next of kin: see orders in *Williams* v. *Kershaw*,[1] and *Pane* v. *Archbp. of Canterbury*,[2] *Crosbie* v. *Mayor of Liverpool*;[3] and 1 Vict. c. 26, s. 25; *Barnard* v. *Minshull*.[4]

Where the gift to the charity of the residue, or part of the residue, fails, such gift, according to a well-known rule, so far as it is invalid, does not fall into the residue but devolves, as undisposed of, on the next of kin: *Skrynnher* v. *Northcote*;[5] and where the testator has devised and bequeathed his real and personal estate to trustees in trust for sale and payment of debts and given the residue to charities, so much of the residue as arises from the sale of the real estate as is undisposed of through the gift to charity being invalid, will belong to

[1] 1 Set. 589.
[2] 1 R. & M. 759 (n.).
[3] Ibid. 761 (n.).
[4] Johns. 276.
[5] 1 Sw. 570.

the heir, as the conversion fails: *Akroyd* v. *Smithson*;[1] *Robinson* v. *London Hospital*;[2] *Jones* v. *Mitchell*.[3]

So where money is directed to be laid out in land for a charity, and the gift therefore fails, it goes to the next of kin: *Cogan* v. *Stephens*;[4] see also *Williams* v. *Williams*.[5]

Where the testator directs the real and personal estate to be converted, and the fund produced by such conversion is dealt with by the will as a mixed fund, the residuary legatee (if any) is entitled to any part of such fund which is undisposed of through the failure of an attempted bequest to charity: *Durour* v. *Motteux*;[6] *Green* v. *Jackson*;[7] *Wildes* v. *Davies*;[8] *Spencer* v. *Wilson*;[9] *Court* v. *Buckland*.[10] But it is otherwise where, though conversion of both real and personal estate is directed, the funds arising from each are by the will treated as distinct: *Dixon* v. *Dawson*.[11]

The costs of an administration suit will not be thrown exclusively on such part of the testator's personal estate as is undisposed of, by lapse or failure of a charitable bequest, but on the whole estate rateably: *Trethewy* v. *Hellyar*[12]; *Fenton* v. *Wells*;[13] Morgan and Davey on Costs, p. 110.

[1] 1 Br. C. C. 503.
[2] 10 Ha. 19.
[3] 1 S. & S. 290.
[4] 5 L. J. (N.S.) Ch. 17.
[5] Ibid. 87.
[6] 1 Ves. Sen. 320; 1 S. & S. 292 (n.).
[7] 5 Russ. 35; 2 R. & M. 238.
[8] 1 S. & G. 475.
[9] L. R. 16 Eq. 501.
[10] 1 Ch. D. 605.
[11] 2 S. & S. 327.
[12] 4 Ch. D. 53.
[13] W. N. 1877, p. 218.

CHAPTER VI.

EXEMPTIONS FROM THE ACT.

THE exemptions mentioned in the Act itself, s. 4, are, first, the two universities: see *Att.-Gen.* v. *Tancred*,[1] *Att.-Gen.* v. *Munby*.[2]

The restriction on the number of advowsons to be held by the colleges was removed by 43 Geo. 3, c. 101.

The colleges of Eton, Winchester, and Westminster are also expressly exempted from the Act, s. 4.

Many other charitable institutions have also been wholly or partially exempted from the Act by statutes subsequently passed. Thus, the Foundling Hospital: 17 Geo. 2, c. 29; the British Museum: 26 Geo. 2, c. 22, 5 Geo. 4, c. 39; Queen Anne's Bounty: 43 Geo. 3, c. 107; Greenwich Hospital: 10 Geo. 4, c. 25; St. George's Hospital: 4 Will. 4, c. 38; the Bath Infirmary: 19 Geo. 3, c. 23; see *Mogg* v. *Hodges*;[3] the Westminster Hospital: 6 Geo. 4, c. 20; and many similar

[1] 1 Eden. 15; S. C. Amb. 351.
[2] 1 Mer. 327.
[3] 2 Ves. Sen. 52.

institutions, have obtained exemption from the Act, the extent of which varies, but in general only enables them to acquire by devise land to a limited extent.

In some cases charities are empowered by Acts passed since the Mortmain Act, to purchase, take, and hold lands without license in mortmain, but this will not, in general, enable them to take by devise; the Mortmain Act having, as before observed, deprived testators of the power of devising to charity: *Mogg* v. *Hodges*;[1] *B. Museum* v. *White*;[2] *Robinson* v. *London Hospital*.[3] Where, however, the words of a special Act empowered a charity by will, gift, purchase, or otherwise, to acquire and hold land or personal estate, including money charged on land, a devise of lands was sustained: *Perring* v. *Traill*.[4]

Where, however, a charity has, under an Act passed since the Mortmain Act, power to acquire money or other personal estate given, devised, or bequeathed, and also to acquire land to a limited extent, money arising from the sale of or charged on land cannot be bequeathed to it by will: *Nethersole* v. *Indigent Blind*;[5] *Chester* v. *C.*;[6] see, too, *Church Building Society* v. *Coles*;[7] *Sherwood* v. *Vincent*.[8]

In every case, therefore, the words of the special

[1] 2 Ves. Sen. 52.
[2] 2 S. & S. 594.
[3] 10 Ha. 19.
[4] L. R. 18 Eq. 88.
[5] L. R. 11 Eq. 1.
[6] L. R. 12 Eq. 444.
[7] 5 D. G. M. & G. 324.
[8] M. R., 12th June, 1877.

Act must be looked at to ascertain whether the particular charity is or is not capable of taking by devise.

By the Church Building Act, 43 Geo. 3, c. 108, personalty not exceeding £500, or land not exceeding five acres, may be given by deed enrolled or will executed three months before the testator's death for erecting, rebuilding, repairing, purchasing, or providing any church or chapel (Church of England), or "any mansion-house for the residence of any minister" of such church or chapel, or "any outbuildings, office, churchyard, or glebe, for the same respectively:" see *Sinnett* v. *Herbert*;[1] shewing that bequests of money exceeding £500 will be valid to that amount.

Though specific land may be given, the proceeds of sale of land cannot be given for the above purposes by will: *Incorporated Church Building Soc.* v. *Coles.*[2]

So by 51 Geo. 3, c. 115, lords of manors are empowered to grant lands not exceeding five acres, parcel of the waste lands of the manor, for churches or churchyards; see *Forbes* v. *Ecclesiastical Commissioners.*[3]

By 34 Vict. c. 13, land to any extent may be given by deed, and land not exceeding twenty acres for a public park, two acres for a public museum, and one acre for a school, may be given

[1] L. R. 7 Ch. 232.
[2] 5 D. G. M. & G. 324.
[3] L. R. 15 Eq. 51.

by will; and by the same Act personal estate (apparently) to any amount may be given by deed or will for the purchase of land for the above purposes: see, too, as to grants of land for schools, 4 & 5 Vict. c. 38, 7 & 8 Vict. c. 37, 12 & 13 Vict. c. 49, 15 & 16 Vict. c. 49. Deeds executed otherwise than for valuable consideration and wills under 34 Vict. c. 13, are to be executed twelve months before the death of the grantor or testator, and enrolled within six months after the same shall come into operation.

By 6 & 7 Vict. c. 37, s. 22, lands or personal estate to any amount may be given by deed or will (in case of lands the deed to be enrolled) to the Ecclesiastical Commissioners towards the endowment or augmentation of the income of ministers or perpetual curates of the Church of England, or for providing any church or chapel for the purposes mentioned in the Act: *Baldwin* v. *Baldwin*.[1]

By 31 & 32 Vict. c. 44, conveyances for valuable consideration of land not exceeding two acres for the erection of a building, or whereon a building has been erected, to any trustees on behalf of any society or body associated for religious purposes, or the promotion of education, arts, literature, science, or other like purposes, are altogether exempted from the Mortmain Act. The trustees, may, however, if they think fit, enrol the deed.

[1] 22 Beav. 419.

The Mortmain Act is expressly declared not to extend to Scotland, where it seems lands may be mortified with consent of the superior: see Shelford on Mortmain, 257 (n.); and see as to charities in Scotland, *Oliphant* v. *Hendrie*;[1] *Att.-Gen.* v. *Lepine*;[2] and *Mackintosh* v. *Townsend*;[3] but it is equally inapplicable to Ireland: *Campbell* v. *Earl Radnor*;[4] or to India: *Mitford* v. *Reynolds*;[5] or to the colonies, being, as said by Sir Wm. Grant in *Att.-Gen.* v. *Stewart*,[6] "in its causes, its objects, its provisions, its qualification, and its exceptions, a law wholly English, calculated for purposes of local policy, complicated with local establishments, and incapable, without great incongruity in its effect, of being transferred as it stands into the code of any other country:" see *Whicker* v. *Hume*.[7]

In India gifts of immovables to charity by will are regulated by the Indian Succession Act, 1865, by which, where there are near relations, the will must be executed twelve months before death: *Macdonald* v. *M.*[8]

As to Canada, see *Abbott* v. *Fraser*.[9]

Land, or the produce of land, in England cannot, of course, be devised to a charity in Scotland

[1] 1 Bro. C. C. 571.
[2] 2 Sw. 181.
[3] 16 Ves. 330.
[4] 1 Bro. C. C. 272.
[5] 1 Ph. 185.
[6] 2 Mer. 143.
[7] 7 H. L. C. 124.
[8] L. R. 14 Eq. 60.
[9] L. R. 6 P. C. 96.

or Ireland: *Curtis* v. *Hutton*;[1] and a bequest of money to be laid out in land in England or Scotland for a charity in Scotland, is void: *Att.-Gen.* v. *Mill.*[2]

The same rules as to construing bequests to charities liberally, and carrying them into effect *cy-près*, apply to Scotland as to England: *Bruce* v. *Presbytery of Deer*;[3] *Clephane* v. *Lord Provost of Edinburgh*.[4]

The Court of Session has in charity cases the same jurisdiction as the Court of Chancery in England: *University of Aberdeen* v. *Irving*.[5]

There is no rule in Scotland against marshalling in favour of a charity: *Macdonald* v. *Macdonald*.[6]

Ireland.

As we have seen, the Act does not apply to Ireland. Down to the passing of that Act the law in both England and Ireland appears to have been the same in respect to alienations to charities.

The earlier Statutes of Mortmain, properly so called, were in effect extended to Ireland by Poyning's Act, 10 Hen. 7, c. 22. Devises to corporations were, as in England, invalid, the statute of 10 Car. 1 c. 2, s. 2, having the same effect for Ireland as the Wills Act, 34 & 35 Hen. 8, c. 5, had in England: *Att.-Gen.* v. *Flood*.[7]

[1] 14 Ves. 537.
[2] 3 Russ. 328; 5 Bligh. N.S. 593; 2 Dow. & Cl. 393.
[3] L. R. 1 H. L., Sc. 96.
[4] L. R. 1 H. L., Sc. 417.
[5] Ibid. 289.
[6] L. R. 14 Eq. 60.
[7] Hayes, 611.

But devises to charities appear to have been at all times valid in Ireland as in England: *Incorporated Soc.* v. *Richards.*[1]

Licences to individuals and corporations to alien, and also to purchase, acquire, take and hold lands, tenements, rents, and hereditaments in mortmain, are by the Irish Act, 32 Geo. 3, c. 31, grantable by the Crown.

The Irish Mortmain Act is 7 & 8 Vict. c. 97, which enacts (s. 16), that "no donation, devise, or bequest for pious or charitable uses shall be valid to create or convey in Ireland any estate in lands, tenements, or hereditaments for such use, unless the deed, will, or other instrument containing the same shall be duly executed three calendar months at least before the death of the person executing the same, and unless every such deed or instrument, not being a will, shall be duly registered in the office for registering deeds in the city of Dublin, within three calendar months after the execution thereof."

Commissioners of charitable donations for Ireland are appointed by this Act in the place of similar Commissioners appointed by 40 Geo. 3, c. 1; and the property belonging to the last-named Commissioners is vested in the new body (s. 11).

By sect. 12, the Commissioners are to sue for the recovery of charitable donations, devises, and bequests, wills withheld, concealed, or misapplied, and

[1] 1 Dr. & W. 258, 293.

to apply the same according to the intention of the donor.

By sect. 15, lands, tenements, hereditaments, goods and chattels may be granted by deed duly executed and attested by two witnesses, or by will, for building, enlarging, upholding, or furnishing any chapel or place of religious worship of persons professing the Roman Catholic religion, or in trust for any archbishop or bishop officiating in any district, or other person in holy orders of the Church of Rome, or having pastoral superintendence of any congregation of persons professing the Roman Catholic religion, and their successors, or for building a residence for his and their use; but nothing therein contained is to render lawful donations, devises, or bequests in favour of religious orders prohibited by 10 Geo. 4, c. 7: see *Sims* v. *Quinlan*.[1]

It will be seen that this Act contains no restrictions on gifts or bequests of money, to be laid out in land, to charities in Ireland, and such bequests are valid: *Att.-Gen.* v. *Power*;[2] and see *Curtis* v. *Hutton*,[3] *Pollock* v. *Day*.[4]

So also money charged on land may, in Ireland, be bequeathed to charity: *Stewart* v. *Barton*.[5]

If a legacy be given by will in England to a

[1] 16 Ir. Ch. R. 195; affirmed on appeal, 17 Ir. Ch. R. 43.
[2] 1 Ball & B. 145.
[3] 14 Ves. 540.
[4] 14 Ir. Ch. R. 297–371.
[5] Ir. R. 6 Eq. 215.

charity in Ireland, the Court of Chancery will not assume administration, but will order it to be paid to the Commissioners: *Collyer* v. *Burnett*.[1]

An immediate bequest of money, to be expended in masses for testator's soul and the souls of his relatives, is valid, but not charitable: *Read* v. *Hodgens*;[2] *Att.-Gen.* v. *Delaney*.[3] But a bequest to a bishop and his successors to celebrate masses in perpetuity, is void: *Dillon* v. *Reilly*.[4]

In Ireland, legacies for charitable purposes are exempt from legacy duty, 47 Geo. 3, s. 1, c. 50; 5 & 6 Vict. c. 82: see *Att.-Gen.* v. *Hope's Exors.*;[5] *Att.-Gen.* v. *Bagot*;[6] and see *Cullen* v. *Att.-Gen. for Ireland*.[7]

[1] Tam. 79.
[2] 7 Ir. Eq. R. 17.
[3] 10 Ir. R. Com. Law, 104.
[4] Ir. R. 10 Eq. 152.
[5] Ir. R. 2 Com. Law, 368.
[6] 13 Ir. Com. Law Rep. 48.
[7] L. R. 1 H. L. 190.

CHAPTER VII.

ADMINISTRATION OF CHARITIES.

CHARITIES are either established by charter as eleemosynary corporations or are managed by individual trustees, but management by individual trustees presents so many inconveniences that the Charity Commissioners are now, by 35 & 36 Vict. c. 24, s. 1, empowered, on the application of the trustees of any charity, to grant them incorporation.

Where a charity has been erected by charter, the right to execute the jurisdiction of a visitor over it results of common right to the founder or his heirs if a private person, or to the Crown if the charity is founded by the Crown: *Eden* v. *Foster*;[1] *Att.-Gen.* v. *Gaunt*.[2] The founder has power to nominate a special visitor, and questions may arise as to whether he has, in fact, done so or not. The governors of a school or the warden of a hospital are not necessarily the special visitors: *Eden* v. *Foster*;[3] *Att.-Gen.* v. *Archbishop of York*.[4] Where the Crown is the founder, or the heir of the founder, being the visitor, cannot be found or is

[1] 2 P. Wms. 326.
[2] 3 Swan. 148.
[3] 2 P. Wms. 326.
[4] 2 R. & M. 468.

lunatic, the right of visitation is in the Crown, and in such cases the right is exercised by the Court of Chancery; see Lewin on Trustees, 6th ed., 465; *Att.-Gen.* v. *Dixie.*[1] The application in such cases is by petition to the Great Seal: *Re Christ Church.*[2]

The duty of the visitor is to see that the internal affairs of the charity are administered in accordance with the rules and regulations, and for this purpose he has very extensive powers, including the removal and appointment of governors or other corporators: *Att.-Gen.* v. *Earl of Clarendon*[3] (*Harrow School Case*); *Whiston* v. *Dean and Chapter of Rochester*;[4] *Att.-Gen.* v. *Magdalen College.*[5]

With the decisions of the visitor, unless shewn to have proceeded from corrupt motives, the Court of Chancery will not interfere; see cases above cited, and see *Ex parte Inge*;[6] *Hayman* v. *Governors of Rugby.*[7]

The Court of Queen's Bench has the power by mandamus to compel the visitor to act.

In practice the duties of a visitor are now rarely exercised: *Att.-Gen.* v. *St. Cross Hospital*,[8] and, in fact, it is often impossible to shew in whom the right of visitation resides, in which case the Court of Chancery, as representing the Crown, assumes the jurisdiction.

[1] 13 Ves. 519.
[2] L. R. 1 Ch. 526.
[3] 17 Ves. 491.
[4] 7 Ha. 532.
[5] 10 Beav. 402.
[6] 2 R. & M. 590.
[7] L. R. 18 Eq. 28.
[8] 17 Beav. 435.

The rights of special visitors, however, when existing, are to some extent preserved by recent legislation. Thus, when the Charity Commissioners have power to remove a schoolmaster or mistress, the consent of the visitor, if any, is required: 16 & 17 Vict. c. 137, s. 22. So where any order is made by them apportioning parish charities on division of a parish, notice is to be given to the visitor: 18 & 19 Vict. c. 124, s. 14. So, under the Grammar School Act, 3 & 4 Vict. c. 77, the visitor may be heard on application to the Court of Chancery for establishing schemes for the management of such schools; and by s. 9 their consent is required before several schools can be united. It is thought that in a work like the present it is unnecessary to refer further to the subject of visitors, but the reader is referred for further information on the subject to Tudor on Charities, chap. 4, ss. 2–3, and Lewin on Trustees, 6th ed. 463.

Where the property of the charity is misapplied, the Court of Chancery, which has always assumed, an exclusive jurisdiction in the administration of charitable trusts, will interfere whether there is a visitor or not: *Ex parte Berkhampstead School*;[1] *Att.-Gen.* v. *Browne's Hospital*;[2] *Att.-Gen.* v. *St. Cross Hospital*;[3] *Att.-Gen.* v. *Earl of Clarendon.*[4]

Property may, of course, be given to an existing

[1] 2 Ves. & B. 138.
[2] 17 Sim. 137.
[3] 17 Beav. 435.
[4] 17 Ves. 499.

eleemosynary corporation upon trusts which differ from those affecting the original property of such corporation. In such case the jurisdiction of the visitor over the original trust property will not be extended to that given upon different trusts, and the Court of Chancery undertakes the administration, as in cases where individuals are the trustees: *Green* v. *Rutherforth.*[1]

The intentions of the founder as shewn by the rules and regulations, in other words, the trusts declared of the charity estate, must be strictly observed by the trustees. Thus a trust for the poor of a particular parish cannot be applied for the benefit of another parish: *Att.-Gen.* v. *Brandreth.*[2]

So, where a chapel was vested in trustees for the use of the scholars attending a school, it was held that the revenues of the charity could not be applied to enlarge the chapel for the accommodation of the inhabitants of a hamlet by whom it had long been used: *Att.-Gen.* v. *Earl Mansfield.*[3]

So strictly, indeed, was the intention of the founder at one time followed, that it was held that "a free grammar school," being a school for teaching the learned languages only, no part of the funds could be applied to teaching modern languages, or writing, and arithmetic: *Att.-Gen.* v. *Whiteley*;[4] and see *Att.-Gen.* v. *Dean of Christ*

[1] 1 Ves. Sen. 462.
[2] 1 Y. & C. Ch. R. 200.
[3] 2 Russ. 501.
[4] 11 Ves. 241.

Church.[1] In subsequent cases, however, more liberal views have prevailed, and it was held that writing and arithmetic might well be introduced into a scheme for regulating a free grammar school : *Att.-Gen.* v. *Ladyman.*[2] Now, by the Grammar Schools Act, 3 & 4 Vict. c. 77, the system of education in any grammar school is extended to other useful branches of literature and science, in addition to or (in the cases specified in the Act) in lieu of the Greek and Latin languages, or such other instruction as may be required by the laws of the foundation or the existing statutes : s. 1.

Generally speaking, property given for the benefit of the poor cannot be applied for those in receipt of parochial relief, thus indirectly benefiting the rich : *Att.-Gen.* v. *Corporation of Exeter,*[3] *Att.-Gen.* v. *Wilkinson.*[4] But in old charities there are many cases where the trusts are expressly declared to be for the benefit of the class for the relief of which provision is now made by the Poor Law, and in such cases the trusts must of course be observed : *Att.-Gen.* v. *Blizard ;*[5] *Att.-Gen* v. *Mayor, &c., of Berwick.*[6]

The authority of Parliament is alone sufficient to justify the application of the funds of an existing

[1] Jac. 474.
[2] C. P. Cooper, 1837–38, 180–184.
[3] 3 Russ. 397.
[4] 1 Beav. 372.
[5] 21 Beav. 233.
[6] Tam. 239.

charity for a different purpose: *Att.-Gen.* v. *Market Bosworth School.*[1] The Charity Commissioners now have power to sanction schemes provisionally, which are then to be submitted to Parliament for approval: 16 & 17 Vict. c. 137, ss. 54–60.

A corporation has an inherent power of making bye-laws for the regulation of its internal affairs, but in the case of their being trustees for a charity, no bye-law can of course be made which would tend to defeat the object of the trust: *Eden* v. *Foster*;[2] nor can trustees having power under deed to make orders for the management of a charity alter the character of the charity: *Att.-Gen.* v. *Pearson.*[3] Trustees for a charity can rarely be advised to act on their own responsibility in applying the funds in any other manner than in strict compliance with the terms of the trust. In some cases, however, the trustees have been held justified in departing from the strict letter of their trust. Thus where a fund was held upon trust for finding a master, the trustees were held justified in applying part of the revenues towards rebuilding and repairing the schoolroom and school-house, as otherwise they must be provided by the master himself: *Att.-Gen.* v. *Mayor of Stamford.*[4] So where trustees of a school increased the salaries directed by the founder to be paid to the masters, the Court refused to order them to refund: *Att.-Gen.* v.

[1] 35 Beav. 305.
[2] 2 P. Wms. 327.
[3] 3 Mer. 411.
[4] 2 Swans. 592.

Dean of Christchurch,[1] and see *Att.-Gen.* v. *Mercers' Company*.[2]

Parish property, which is necessarily held for a charitable use, *Att.-Gen.* v. *Webster*,[3] was often lost from there being no trustees; and to remedy this such property was, by 59 Geo. 3, c. 12, s. 17, vested in the churchwardens and overseers, not as a corporation, but as persons having a parliamentary succession in the nature of a corporation: *Smith* v. *Adkins*.[4] For the cases on the construction of this Act see Lewin on Trustees, 6th ed., 467, note (1). By the statute 5 & 6 Wm. 4, c. 69, power to dispose of any workhouse land, or property belonging to the union or parish, or vested in trustees for it, is given to the guardians or overseers (s. 3); but this does not, it seems, give them the legal estate: *Doe* v. *Webster*.[5]

By 9 Geo. 1, c. 7, churchwardens and overseers were empowered to purchase workhouses for the poor, and further powers were given by statute 22 Geo. 3, c. 83, and the Act 59 Geo. 3, c. 12, before referred to. By 4 & 5 Wm. 4, c. 76, s. 21, these powers are to be exercised with consent of Poor Law Commissioners, and these Acts are amended and explained by statute 5 Vict. c. 18, which enacts (s. 2) among other enactments, that the power of disposition of lands shall not extend to

[1] 2 Russ. 321.
[2] 2 M. & K. 654.
[3] L. R. 20 Eq. 483.
[4] 8 M. & W. 362.
[5] 12 A. & E. 448.

charitable donations not given for the general benefit of the parish.

By the Act 8 & 9 Vict. c. 70, for amending the Church Building Acts, where the Commissioners form a separate or district parish or chapelry, any charitable devises, &c., belonging to the remainder of the parish are to be apportioned, but this does not apply to property given for repair of the parish church: *Church Estate Charity, Wandsworth.*[1] See, too, as to construction of this Act, which gives the Court a discretionary power to apportion the charities or not, *Att.-Gen.* v. *Love*;[2] *Ex parte Incumbent of Brompton*;[3] *Re Lambeth Charities.*[4] By the Act 18 & 19 Vict. c. 124, ss. 10, 11, power is given to the Charity Commissioners to apportion charities whose income does not exceed £30 after the division of parishes.

Where a school is a Church of England school, as will be the case not only where the founder has expressly so directed, but where he has done so by implication, as by directing it to be for the "promotion of godly learning," *Re Ilminster School.*[5] Dissenters cannot properly be elected trustees; but if so elected, the Court will not on that ground only remove them: *Att.-Gen.* v. *Clifton*;[6] and in the case last cited it was said by

[1] L. R. 6 Ch. 296.
[2] 23 Beav. 499.
[3] 5 D. G. & S. 626.
[4] 22 L. J. (N.S.) Ch. 959.
[5] 2 D. G. & J. 535.
[6] 32 Beav. 596; but see *Re Burnham Schools*, L. R. 17 Eq. 241.

Lord Romilly that a Dissenter might, under peculiar circumstances, be elected schoolmaster, and the children of Dissenters may be admissible as scholars. See, too, *Att.-Gen.* v. *Calvert*.[1]

Power to make schemes for the administration of the trusts of endowed schools was conferred on Commissioners appointed by the Endowed Schools Act, 1869, 32 & 33 Vict. c. 56; continued 37 & 38 Vict. c. 87.

Where a charity, as a chapel, is founded by numerous subscribers, a declaration of the trusts made by the trustees about the date of the foundation is *primâ facie* evidence of the intention of the founders: *Att.-Gen* v. *Clapham*.[2]

Long usage may be accepted as evidence of the trusts of any charity: *Att.-Gen.* v. *Murdoch*,[3] and this principle is now distinctly recognised as to chapels and schools of Dissenters by the Act 7 & 8 Vict. c. 45. See *Att.-Gen.* v. *Ward*;[4] and as to Roman Catholic charities by the Act 23 & 24 Vict. c. 134, s. 5.

So, too, contemporaneous usage may be used in construing an ambiguous instrument: *Att.-Gen.* v. *Corporation of Rochester*;[5] but not to contradict the clear meaning: *Ibid.*

Parol evidence is admissible to shew in what sense expressions are used in a deed: *Att.-Gen.* v.

[1] 23 Beav. 255.
[2] 4 D. G. M. & G. 626.
[3] 1 D. G. M. & G. 86.
[4] 6 Ha. 483.
[5] 5 D. G. M. & G. 797.

Clapham;[1] *Att.-Gen.* v. *Shore*;[2] *Drummond* v. *Att.-Gen.*[3]

Trustees of a charity had no power to sell the lands: *Att.-Gen.* v. *Kerr*;[4] and for the same reasons leases of lands held on charitable trusts may be set aside if granted for long terms, as 999 years, or as improvident, if reversionary, or made by the trustees to themselves, or at an undervalue. In the case of husbandry leases, no lease should be made for more than twenty-one years, or in the case of building leases for more than ninety-nine years: Lewin, 476, 6th ed. Now the Commissioners have power to sanction building, mining, and other leases: 16 & 17 Vict. c. 137, s. 21. A custom to renew gave no right to the lessees capable of being enforced: *Att.-Gen.* v. *St. John's Hospital*;[5] see *Clayton* v. *Att.-Gen.*;[6] and a covenant for perpetual renewal cannot be enforced against a charity, as such covenant will be a breach of trust: *Lydiatt* v. *Foach*;[7] *Magdalen Coll. Case*;[8] *Watson* v. *Hemsworth Hospital*.[9] See, too, statute 13 Eliz. c. 10, *Moore* v. *Clench*.[10] Power to sell lands to railway companies, and

[1] 4 D. G. M. & G. 591.

[2] 9 Cl. & Fin. 355.

[3] 1 D. & W. 353; 2 H. L. C. 837.

[4] 2 Beav. 420; see now 18 & 19 Vict. c. 124, s. 29, prohibiting sales, mortgages, or leases by trustees except such leases as therein mentioned.

[5] L. R. 1 Ch. 92.

[6] 1 C. P. Cooper, 137.

[7] 2 Ver. 410.

[8] 11 Rep. 66 b.

[9] 14 Ves. 324.

[10] 1 Ch. D. 447.

for other public purposes, has, however, been expressly conferred on trustees for charities. See Lands Clauses Consolidation Act, 1845, s. 7, and 16 & 17 Vict. c. 137, ss. 24, 25, 26, and see 18 & 19 Vict. c. 124, s. 32; and now the Charity Commissioners may sanction the sale or exchange of any lands held on charitable trusts or release of any rent-charges, but this does not interfere with the powers given the trustees for railway or public purposes: see 18 & 19 Vict. c. 124, s. 29.

By 32 & 33 Vict. c. 110, it is enacted (s. 12) that where the trustees or persons acting in the administration of any charity have power to determine on any sale, exchange, partition, mortgage, lease, or other disposition of any property of the charity, a majority of those trustees, or persons acting in the administration of any charity, who are present at a meeting of their body duly constituted, and vote on the question shall have, and be deemed to have always had, full power to execute and do all such assurances, acts, and things as may be requisite for carrying any such sale, &c. into effect, and all such assurances, acts, and things shall have the same effect as if they were respectively executed and done by all such trustees or persons for the time being, and by the official trustee of charity lands. See, also, the earlier Act, 23 & 24 Vict. c. 136, s. 16, enabling a majority of two-thirds to bind the legal estate, under which many conveyances have probably been executed.

The moneys arising from a sale or exchange under the above Acts may, with consent of the Commissioners, be laid out in other lands without a licence, 18 & 19 Vict. c. 124, s. 35. The conveyance should be attested by two witnesses, and enrolled pursuant to 9 Geo. 2, c. 36.

As the bringing of fresh land into mortmain is not favoured, the Court will not generally sanction the investment of accumulations of charitable funds in land: *Att.-Gen.* v. *Wilson.*[1] But in a proper case it will be allowed, as for the enlargement of a school: *Att.-Gen.* v. *Mansfield,*[2] and see 16 & 17 Vict. c. 137, s. 27, and 18 & 19 Vict. c. 124, s. 41, giving to incorporated trustees of charities power in certain cases to purchase lands, the powers (other than compulsory) of the Lands Clauses Consolidation Act, 1845, as to conveyances from persons under disability being extended to such purchases.

In every case where land is first brought into mortmain the deed must comply with the Act 9 Geo. 2, c. 36: *Re Christ's Hospital*:[3] *Doe* d. *Graham* v. *Hawkins.*[4]

It was at first considered that the Statute of Limitations, 2 & 3 Wm. 4, c. 27, did not apply to charities; but it is now settled that an action to recover land or rent belonging to a charity must be brought within twenty years from the time when the right to bring such action accrued: *Mag-*

[1] 2 Keen, 680.
[2] 14 Sim. 601.
[3] 12 W. R. 669.
[4] 2 Q. B. Rep. 212.

dalen Coll. v. *Att.-Gen.*;[1] *Att.-Gen.* v. *Davey.*[2] In the latter case, it was held that a lease for five hundred years was equally with a conveyance of the fee unimpeachable after the time fixed by the Statute of Limitations had elapsed; see, too, *Att.-Gen.* v. *Payne.*[3] This rule, however, does not apply to leases which are voidable under the statute 13 Eliz. c. 10, such leases being valid only as against the maker and his successors until some such successor elect to avoid them: *Governors of Magdalen Hospital* v. *Knotts.*[4]

A purchaser for valuable consideration without notice, of lands held upon a charitable trust, is equally with such a purchaser of lands held on a private trust protected in Equity: see the Statute 43 Eliz. c. 4, s. 6; *Att.-Gen.* v. *Wilkins.*[5] A volunteer, however, or a purchaser with notice, is in no better position than the trustee from whom he claims unless the Statute of Limitations applies: *Att.-Gen.* v. *Hall.*[6]

In cases of express trust for charities, as for individuals, the Statute of Limitations does not begin to run until there has been an alienation for valuable consideration: *Commrs. of Charitable Donations* v. *Wybrants.*[7]

In cases of fraud, so long as the fraud is not, or

[1] 6 H. L. Ca. 189.
[2] 4 D. G. & J. 136.
[3] 27 Beav. 168.
[4] 5 Ch. D. 175.
[5] 17 Beav. 285.
[6] 16 Beav. 388.
[7] 2 J. & L. 182.

could not, with the use of due diligence, have been discovered, the statute does not begin to run until discovery: *Vane* v. *Vane*.[1]

Where a charity estate has been improperly sold to a purchaser, with notice by the trustees, either the estate may be followed, or the money in the hands of trustees, or laid out by them: *Att.-Gen.* v. *Newcastle*.[2]

There is no precise limit for which trustees who have misapplied trust funds may be made to account, and in each case the Court is guided in directing an account by the particular circumstances: *Att.-Gen.* v. *Mayor of Exeter*;[3] *Att.-Gen.* v. *Brewers' Co.*;[4] *Att.-Gen.* v. *Corp. of Stafford*;[5] *Att.-Gen.* v. *Newbury*;[6] and where the misapplication of charitable funds has not been wilful, but from misunderstanding, the account will not, it seems, be carried back beyond the date of the information where hardships would result from carrying it back to an earlier date: *Att.-Gen.* v. *Corp. of Exeter*;[7] *Att.-Gen.* v. *Drapers' Co.*;[8] *Att.-Gen.* v. *Christ's Hospital*;[9] *Att.-Gen.* v. *Pretyman*;[10] *Att.-Gen.* v. *Wax Chandlers' Co.*[11]

Where a decree is made declaring that a corporation is liable to make good a breach of trust,

[1] L. R. 8 Ch. 383.
[2] 5 Beav. 307; 12 Cl. & F. 402.
[3] Jac. 443; 2 Russ. 362.
[4] 1 Mer. 495.
[5] 1 Russ. 547.
[6] 3 My. & K. 647.
[7] 2 Russ. 45; 3 Russ. 395.
[8] 4 Beav. 67.
[9] Ibid. 73.
[10] Ibid. 462.
[11] L. R. 6 H. L. 1.

it must be enforced by sequestration: *Att.-Gen.* v. *Earl Retford.*[1]

In cases of charitable trusts the Court exercises a wide discretion, discouraging extravagant and unprofitable litigation: *Att.-Gen.* v. *Shearman.*[2]

Compromises of claims by or against a charity are frequently made with the sanction of the Att.-Gen., and now of the Charity Commissioners: *Att.-Gen.* v. *Corporation of Exeter*;[3] *Att.-Gen.* v. *Pretyman*;[4] *Att.-Gen.* v. *Boucherett*;[5] 16 & 17 Vict. c. 137, s. 23; 18 & 19 Vict. c. 124, s. 31.

The Court shews more indulgence in the case of breaches of charitable trusts than in those where individuals are beneficially interested: see *Att.-Gen.* v. *Brettingham*;[6] and this is especially the case where a corporation is trustee for the charity: *Att.-Gen.* v. *Caius College.*[7] Where, however, trustees who have benefited by their breach of trust improperly defend a suit for remedying such breach, they may be made to bear the costs: *Att.-Gen.* v. *Christ's Hospital.*[8]

It does not fall within the scope of this treatise to give any detailed account of the practice in suits relating to charities. The regular and ordinary course of proceeding is by information in the name of the Att.-Gen.

[1] 3 My. & Cr. 484.
[2] 2 Beav. 104.
[3] 2 Russ. 370.
[4] 4 Beav. 462.
[5] 25 Beav. 116.
[6] 3 Beav. 91.
[7] 2 Keen, 150, 169.
[8] 4 Beav. 73.

By Sir Samuel Romilly's Act, 52 Geo. 3, c. 101, a summary mode of procedure on petition by two persons interested, allowed by the Att.-Gen., was introduced in cases where the direction or order of a Court of Equity was required in the administration of charitable trusts.

This mode of proceeding applies only to plain and simple cases, where the opinion or direction of the Court is required: *Re Manchester New Coll.*;[1] *Corporation of Ludlow* v. *Greenhouse*;[2] and the restricted construction placed on this Act has, it is believed, led to its being little resorted to in practice. For the cases, however, where such procedure may be adopted, see Dan. Ch. Pr., 5th ed., 1761; Lewin on Trustees, 6th ed., 757, where it will be seen that the Act will apply in cases where the appointment of new trustees, or the sanction of the Court to a sale of land belonging to a charity, or the apportionment of the charities belonging to a parish, where such parish has been divided: *Re Church Estate Charity, Wandsworth*;[3] *Re West Ham Charities*.[4] Applications under the Grammar Schools Act, 3 & 4 Vict. c. 77, may also be made under the Act of 52 Geo. 3, c. 101.

By ss. 28 & 30 of the Charitable Trusts Act, 1853, 16 & 17 Vict. c. 137, power to make orders in Chambers as to the removal or appointment of trustees or giving other relief in the case of

[1] 16 Beav. 610.
[2] 1 Bligh. N.S. 17.
[3] L. R. 6 Ch. 296.
[4] 2 D. G. & Sm. 218.

charities, the income of which amounts to £30, was conferred on the Judges of the Court of Chancery; or as to charities within the City of London, where the income is under £30; and similar power is given to the Judges of the Palatine Court of Lancaster in cases within the Duchy. Where the income does not exceed £100, such orders are not to be subject to appeal (s. 28): *Re Charity for Prisoners.*[1] Where the income is under £30, the charity not being in London, by ss. 32–38 similar power was given to the District County Court, or Court of Bankruptcy; and by 23 & 24 Vict. c. 136, s. 11, the jurisdiction of these Courts is extended to cases where the income does not exceed £50. The certificate of the Commissioners is, by s. 44 of the Act of 1853, made evidence as to the amount of the annual income of a charity.

The Charity Commissioners, however, are empowered by s. 34, when two or more district Courts of Bankruptcy, or County Courts, have concurrent jurisdiction, to direct in which the application shall be made, or to direct the application to be made to a Judge in Chancery, and no order of a Bankruptcy or County Court is valid without their approval: see Act of 1853, ss. 35–37. Sections 39, 40, regulate appeals to be made with consent of the Commissioners. Such appeals may be heard in Chambers. By s. 41 the jurisdiction is not to extend to determining questions of adverse title.

[1] L. R. 8 Ch. 199.

By 23 & 24 Vict. c. 136, the powers of making such orders as had been given by the previous Act to the Judges in Chambers, or the Bankruptcy or County Courts, may be exercised by the Commissioners; where the income of the charity amounts to £50 or upwards, such orders can only be made on application of the trustees: ss 2–4.

The jurisdiction thus given is not to be exercised where the Commissioners think the case more fit for the decision of the Courts; s. 5. *Re Burnham Schools.*[1]

As to appeals, see s. 8, and 32 & 33 Vict. c. 110, s. 10.

By s. 13 of the Act 23 & 24 Vict. c. 136, magistrates are empowered to give possession of property of the charity held over by schoolmasters or officers, or recipients of the benefit of charity.

Official trustees of charitable funds are appointed by the Charitable Trusts Act, 1853, s. 51, and trustees or others holding annuities, stocks, &c., for a charity, may be ordered by the Court or a Judge to transfer or deposit them with such trustees.

See also, as to the powers and duties of such trustees, s. 52 of the Act of 1853, and 18 & 19 Vict. c. 124, ss. 12, 17–29, and 23 & 24 Vict. c. 136, ss. 12, 17, 18, 23.

The official trustee of charity lands is appointed by s. 47 of the Act of 1853, amended by

[1] L. R. 17 Eq. 241.

18 & 19 Vict. c. 124, s. 15, for the purpose of taking, holding, and conveying lands of a charity, and the lands of a charity may be ordered to vest in him, and revested in the trustees (ss. 48, 49), where, on the appointment of new trustees, a vesting order is requisite. By s. 50 he is declared to be a bare trustee. See also 13 & 14 Vict. c. 28, as to appointments of new trustees of lands held for religious or educational purposes, enacting that such lands shall vest without a conveyance.

The title-deeds of a charity may be deposited in a repository provided by the Charity Commissioners: see Act of 1853, s. 53; and see 23 & 24 Vict. c. 136, s. 19, empowering the Board to require deeds to be deposited.

Where trustees of a charity have power to dismiss a minister, or schoolmaster, they must act with fairness, and give due notice to such person of the charges against him, and an opportunity to exculpate himself: *Dean* v. *Bennett*;[1] *Re Fremington Sch.*;[2] *Holme* v. *Guy*.[3]

By 32 & 33 Vict. c. 110, s. 13, the majority of the trustees of a charity may bring actions.

By the Judicature Act, 1875, the execution of charitable trusts is assigned to the Chancery Division of the High Court of Justice.

[1] L. R. 6 Ch. 489. [2] 10 Jur. 512. [3] M. R. 3rd Dec. 1877.

CHAPTER VIII.

THE CHARITY COMMISSIONERS.

REFERENCE has already more than once been made to the powers of the Charity Commissioners; but the administration of charitable trusts is now to so great an extent subject to their direction, that their position claims a separate notice.

The Commissioners were appointed under an Act 16 & 17 Vict. c. 137, the Charitable Trusts Act, 1853. Additional Commissioners were created by 37 & 38 Vict. c. 87.

By s. 9, the Board may inquire into the management and administration of any charity; and by s. 10 they may require accounts from trustees of any charity: see *Sir R. Peel's School at Tamworth*;[1] and 18 & 19 Vict. c. 124, *Re Meyricke Fund*.[2]

By s. 16, the Board may, on the application of any trustees, give their opinion and advice as to the administration of any charity, and trustees acting on such opinions and advice are relieved from responsibility.

By sect. 17, no suit, petition, or other proceeding

[1] L. R. 3 Ch. 543. [2] L. R. 13 Eq. 269; 7 Ch. 500.

(not being an application in a suit or matter actually pending) for obtaining any relief, order, or direction concerning any charity is to be brought without notice to the Board, and their sanction being obtained: *Re Watford Local Board*;[1] *Re Bingley Free School*;[2] *Hodgson* v. *Forster*;[3] *Holme* v. *Guy*;[4] and see *Braund* v. *Earl Devon*.[5] As to what is a matter pending, *Re Jarvis's Charity*,[6] *Re Ford's Charity*,[7] which shew that where a final order has been made by the Court, on petition or otherwise, any further application must be with the sanction of the Commissioners.

Such sanction is not required for payment into Court of money belonging to a charity under the Trustee Relief Act, or a railway, nor for any subsequent dealing with such money: *Re St. Giles Volunteer Corps*[8]; *Re Lister's Hospital*.[9]

It seems that where a fund partly belongs to a charity exempt from the jurisdiction of the Commissioners, their sanction is not required: *Re Meyrick*.[10]

By s. 18, the right of the Att.-Gen. to act *ex officio* is preserved.

By s. 19, the Board may direct an inquiry by

[1] 2 Jur. N.S. 1045.
[2] 2 Drew. 285.
[3] W. N. 1877, p. 74.
[4] 5 Ch. D. 901.
[5] L. R. 3 Ch. 800.
[6] 1 Drew. & S. 97.
[7] 3 Drew. 324.
[8] 25 Beav. 313.
[9] 6 D. G. M. & G. 184.
[10] 24 L. J. Ch. 669.

an inspector, and may direct any suit or other proceeding, on the report of such inspector; and by s. 20, they may certify any case to the Att.-Gen. as being a case in which legal proceedings should be taken.

Sect. 21 empowers the Commissioners to sanction leases, and to sanction the raising of moneys for improvements; and see 23 & 24 Vict. c. 136, s. 15.

By s. 22, they may dismiss any schoolmaster, schoolmistress, or officer of a charity, with consent of the special visitor, if any: see 23 & 24 Vict. c. 136, s. 6, as to notice, and s. 14 as to dismissal of such officers by the trustees of the charity.

By s. 23, they may sanction compromises of suits, extended by 18 & 19 Vict. c. 124, s. 21, to claims against charities.

The provisions as to leases, sales, and exchanges, management and improvement, purchase of lands, and raising moneys for improvement have been already referred to, as have also the provisions giving to Judges in Chambers, and to the Bankruptcy and County Courts, power to make orders as to administration of charitable trust.

By s. 46, the rights and privileges of the Church of England in charities for the exclusive or special benefit of members of that Church, are preserved.

The provisions as to the official trustee of charity

lands and the official trustee of charitable funds have also been already noticed.

Sects. 54–60 provide for the sanction by the Board of schemes requiring the authority of Parliament.

Sect. 61, amended by 18 & 19 Vict. c. 124, s. 43, regulates the manner in which accounts are to be delivered to the Commissioners by trustees of charities.

By s. 64, and 18 & 19 Vict. c. 124, s. 46, disputes may be referred by charities, whether exempt or not, to the decision of the Commissioners, whose award may be made a rule of the Court of Chancery.

The Act applies only to endowed charities in England or Wales; see s. 66, and 18 & 19 Vict. c. 124, s. 48.

The powers of the Commissioners are extended, explained, and further provisions are made as to the administration of charities by 18 & 19 Vict. c. 124 (the Charitable Trusts Amendment Act, 1855); by 23 & 24 Vict. c. 136 (the Charitable Trusts Act, 1860); and by 32 & 33 Vict. c. 110 (the Charitable Trusts Act, 1869); of which the principal have been already noticed in the chapter on Administration.

By 23 & 24 Vict. c. 136, s. 10, the jurisdiction of the Commissioners is extended to charities vested in corporations for their own benefit.

Exempted charities may petition the Commis-

sioners to have the benefit of the Charitable Trusts Act, 32 & 33 Vict. c. 110, s. 14; and see 16 & 17 Vict. c. 137, s. 63.

By s. 62 the universities and colleges of Oxford and Cambridge, &c., cathedral or collegiate churches, Roman Catholic and unendowed institutions, Queen Anne's Bounty, the British Museum, friendly societies, and savings banks are exempted from the operation of the Act, as also Roman Catholic churches, but they are now brought within the Act; see 22 & 23 Vict. c. 50, and 23 & 24 Vict. c. 134; and provisions are made as to charities supported partly by endowment and partly by voluntary subscriptions; see *Re Wilson*,[1] *Hamilton* v. *Spottiswoode*;[2] but the exemption is not to extend to cathedral, collegiate, chapter, or other schools; and see *Att.-Gen.* v. *Sidney Sussex College*,[3] The colleges of Eton and Winchester are exempted by s. 49 of 18 & 19 Vict. c. 124.

"Endowment" means an endowment permanently invested: *Clergymen's Widows, &c., Charities* v. *Sutton*;[4] and a legacy given generally to a charity unendowed and supported by voluntary contributions is not within the Act: *In re Wilson*.[5]

By 37 & 38 Vict. c. 87, the powers of the Commissioners of endowed schools, under the Endowed

[1] 19 Beav. 594.
[2] 15 W. R. 118.
[3] 4 Ch. 722 *et inf.*
[4] 27 Beav. 651; 29 L. J. Ch. 393.
[5] 19 Beav. 594.

Schools Act, 1869, were transferred to the Charity Commissioners.

The powers of making schemes as to endowed schools were, by the Act of 1869, to be exercised before the 31st of December, 1872, continued to the 29th of June, 1875, by 38 & 39 Vict. c. 29.

By 25 & 26 Vict. c. 112, no provision contained in any private Act of Parliament, or decree or order of the Court of Chancery for the appointment or removal of the trustees of any charity, or for or relating to the sale, exchange, leasing, disposal, or improvement of any property, by or under the order or with the approval of the Court of Chancery, shall (in the absence of any express directions to the contrary to be contained in any future Act of Parliament, order, or decree) exclude or impair any jurisdiction or authority which might otherwise be properly exercised for the like purposes by the Charity Commissioners.

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CONTENTS.

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From the NAUTICAL MAGAZINE, July, 1875.

"The law-books of the present day are mostly of two classes: the one written for lawyers, and only to be understood by them; the other intended for the use of non-professional readers, and generally in the form of handy books. The first, in the majority of cases, is of some benefit, if looked upon merely as a compilation containing the most recent decisions on the subject; whilst the second only aims, and not always with success, at popularising some particular branch of legal knowledge by the avoidance of technical phraseology.

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REVIEWS OF THE WORK—*continued.*

that numbered three, and entitled 'The Voyage.' There the master will find a succinct and compendious statement of the law respecting his duties, general and particular, with regard to the ship and its freight from the moment when, on taking command, he is bound to look to the seaworthiness of the ship, and to the delivery of her log at the final port of destination. In Part IV. his duties are considered with respect to the cargo, this being a distinct side of his duplicate character, inasmuch as he is agent of the owner of the cargo just as much as the owner of the ship.

"Next in order of position come 'Bills of Lading' and 'Stoppage in Transitu.' We confess that on first perusal we were somewhat surprised to find the subject of the delivery of goods by the master given priority over that of bills of lading; the logical sequence, however, of these matters was evidently sacrificed, and we think with advantage to the author's desire for unity in his above-mentioned chapters on 'The Voyage.' That this is so is evidenced by the fact that after his seventh chapter on the latter subject he has left a blank chapter with the heading of the former and a reference *ante*. 'The power of the master to bind the owner by his personal contracts,' 'Hypothecation,' and 'The Crew,' form the remainder of the contents of the first volume, of which we should be glad to have made more mention, but it is obviously impossible to criticize in detail a work in which the bare list of cited cases occupies forty-four pages.

"The question of compulsory pilotage is full of difficulties, which are well summed up by Mr. Kay in his note to page 763:—'In the United States no ship is bound to take on board a pilot either going in or coming out of the harbour, but if a pilot offers and is ready, the ship must pay pilotage fees whether he is taken on board or not.' Ships do not exist for pilots, but pilots for ships, so that this option in the use of the pilot, and obligation in the matter of fees, appears to us to be exactly that solution of the difficulty which should not have been arrived at; and, moreover, it is open to the first objection urged by Mr. Kay against the compulsory system of pilotage, which is, that it obliges many ships which do not require pilots to pay for keeping up a staff for those who do. Seven other cogent reasons, for which we must refer the reader to the book itself, though most of them, indeed, will instantly present themselves to the minds of sailors without even an effort of memory, are noted. Section 338 of the Merchant Shipping Act provides that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of a pilot is compulsory by law. If he interferes to correct the pilot in the handling of a ship, with the peculiarities of which the latter cannot generally be acquainted, he may render himself and the owners liable in case of accident, and so a premium is offered to his indifference, proof being always required that the damage was occasioned solely by the pilot's neglect or fault, to entitle the owners to the benefit of this section. The decision in the case of the *General de Caen* well illustrates some of the difficulties surrounding the subject. She was a French ship upon the Thames, where the employment of a pilot is compulsory, and she, therefore, took on board a pilot as well as a waterman to take the wheel in consequence of none of the crew being able to understand English. The waterman put her helm up instead of luffing as the pilot ordered, whereby a barge was run into and damaged. The French owner claimed under Section 389 of 17 and 18 Vic., c. 104. It was held that the pilot was not answerable for the waterman's incapacity or fault; that the pilot gave the proper orders; that it would be contrary to justice to say that the pilot was solely liable for the collision; that the waterman was the servant of the owners, and that they, therefore, were liable. The real question at issue seems to have been whether the English pilot ought to have spoken French or the French ship to have had on board a helmsman who could understand English, and the corollary, when the decision had been given in favour of the former, that the Government officer, when engaging the helmsman, was acting merely as the agent of the French owners.

"The master has a large authority over the passengers on board his ship, equal in cases of great emergency to that which he possesses over the crew. Lord Ellenborough has decided—it will comfort intending travellers by sea to hear, especially if this country should again become involved in a war with a nation which, unlike Ashanti and Abyssinia, possesses a navy—that a master exceeded the limits of his authority in placing a passenger who refused to fight on the poop, though willing to do so elsewhere, in irons all night on that particular part of the ship to which he had objected.

"It is for the interest and security of commerce and navigation that it should be generally known that the amount of service rendered is not the only or proper test by which the amount of salvage reward is estimated, but the Court will grant to successful salvage an amount which much exceeds a mere remuneration for work and labour in order that the salvors should be encouraged to run the risk of such enterprises and go promptly to the succour of lives or vessels in distress, though they must take care that they do not by their subsequent conduct forfeit their claims to such reward.

"That it should be necessary to entice men by money to save the lives of their fellow-creatures is not a matter for congratulation; still it was no doubt to some extent anomalous that formerly, whilst large proportionate sums were paid for the recovery of property, for the rescuing of human life unless associated with property, no salvage reward could be recovered. But by Section 458 of the Merchant Shipping Act the preservation of human life is made a distinct ground of salvage reward, with priority over all other claims for salvage where the property is insufficient, and if the value of the property is not adequate to the payment of the claim for life-salvage alone, the Board of Trade is empowered to award to the salvors such sum as it deems fit, either in part or whole satisfaction.

"There is, perhaps, no species of service liable to

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REVIEWS OF THE WORK—*continued.*

a greater variety of circumstances under which it can be performed than salvage. Consequently we cannot be surprised that questions of this kind frequently come before the Courts, and that the number of decided cases is very large; but Mr. Kay has succeeded in an admirable way in extracting the main points connected with each case, and in presenting them in as few words as possible. Of course fuller information may sometimes be required, but the reader will then know where to find it.

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